INTRODUCTION TO SMALL CLAIMS COURT

MAY 24-26, 2011

It is the daily; it is the small; it is the cumulative injuries of little people that we are here to protect....if we are able to keep our democracy, there must be one commandment: THOU SHALT NOT RATION JUSTICE.

~Judge Learned Hand

In matters of truth and justice, there is no difference between large and small problems, for issues concerning the treatment of people are all the same.

~Albert Einstein

COURSE SCHEDULE

TUESDAY, MAY 24, 2011

9:00 Welcome & Introductions
9:30 Review of Small Claims Observation Checklist
10:00 Small Claims Overview
10:45 Break
11:00 Activity: Action for Summary Ejectment
12:15 Lunch at SOG
1:00 Small Claims Procedure
2:30 Break
2:45 Small Claims Procedure, cont'd
4:45 Recess

WEDNESDAY, MAY 25, 2011

8:30 Checking-In
8:45 The Crux of Contracts
10:00 Break
10:15 Continuing with Contracts
12:30 Lunch at SOG
1:15 Small Group Discussion/Videotaping
4:30 Wrap-Up
4:45 Recess

THURSDAY, MAY 26, 2011

8:30 Checking-In
8:45 A Few More Things: Torts
10:00 Break
10:15 A Few More Things: Actions to Recover Possession
11:30 Mock Trial
12:00 Adjourn

INTRODUCTION TO SMALL CLAIMS: OBJECTIVES

1. That you will be able to correctly apply procedural rules applicable to small claims court.

2. That you will learn to use a job aid in listening for essential elements in witness testimony.

3. That you will be able to correctly decide contract cases and determine damages.

4. That you will develop your own individual policies for:
    a. opening court;
    b. dealing with attorneys
    c. assisting pro se litigants
    d. admitting evidence

5. That rural magistrates will identify ethical challenges unique to conducting court in a small community and share strategies for dealing with those challenges.

6. That urban magistrates will share strategies about how to organize holding court when there are many cases on the docket.

7. That you will be fluent in the procedure for entering judgment and completing forms.

8. That you will be able to identify the factors most influential in litigant satisfaction.

9. That you will be able to identify appropriate judicial demeanor and the factors important to that appearance.

10. That you will be able to list three types of judicial style and categorize your own judicial philosophy.

11. That you will report feeling more confident about holding court.

DAY 1

SCHEDULE FOR TODAY

9:00 Welcome & Introductions
9:30 Review of Small Claims Observation Checklist
10:00 Small Claims Overview
10:45 Break
11:00 Activity: Action for Summary Ejectment
12:15 Lunch at SOG
1:00 Small Claims Procedure
2:30 Break
2:45 Small Claims Procedure, cont'd
4:45 Recess

OBJECTIVES FOR DAY 1

Today you'll begin to get to know one another, and learn what to expect for the next 2 ½ days of our seminar. Our focus for today is on becoming conversant with the most common procedural rules in small claims court and exploring the underlying theoretical framework that makes sense of those rules. In addition, you will practice use of a job aid in keeping track of witness testimony concerning essential elements of a summary ejectment case.
NOTES:
_____
_____
_____
_____
_____
_____

ACTIVITY: COMPARE OBSERVATION CHECKLISTS

Talk with your tablemates about their responses to the observation checklist assigned as an advance activity, and share your own. Use the following sheets to make notes on what you learn.

OBSERVATION CHECKLIST

OPENING COURT

Does the judge introduce himself/herself?
Does the judge say anything before calling the first case? If so, what?
NOTES: _____
_____
_____

CALLING THE CASE

How does the judge call the case—what words does the judge use? Does the judge put the parties under oath one at a time, or together?
NOTES:

_____

_____

_____

HEARING THE CASE

(Both parties present) Who talks first, and how does the judge let them know to do that? Does the judge tell the other party that s/he can question the witness? What happens next?
(Only plaintiff present) What does the judge do? Is the plaintiff's evidence treated the same as in cases in which both parties are present?
(Only defendant present) What does the judge do? Does the judge make the defendant aware of the possibility of moving to dismiss?
NOTES:

_____
_____
_____

Does the judge have to make any decisions about what evidence to admit? If so, what evidence, and what does the judge do?

NOTES:_____
_____
_____
_____

ENTERING JUDGMENT

Is there a clear break between the evidence and the announcement of the judge's decision?

Can you tell from listening exactly what the judge has decided?

Do the parties have an opportunity to ask questions about the decision, and about what happens next?

Does the judge tell the losing party that s/he has a right to appeal?

NOTES
_____
_____
_____

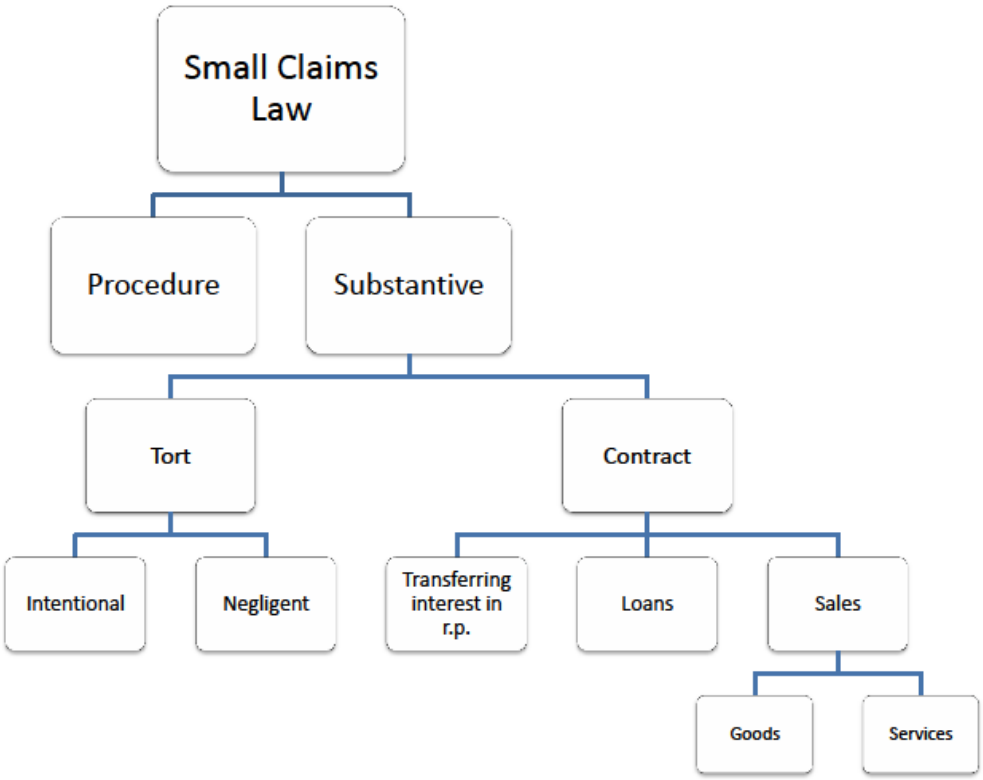
JUDICIAL DEMEANOR

Can you identify any steps the judge takes to help the parties feel more at ease?
NOTES _____
_____
_____
_____
_____
_____
_____

Does the judge make eye contact with the parties?
Does the judge allow ample opportunity for the parties to ask questions?
Does the judge's body language indicate that s/he is listening? How so?
Do you believe that the parties felt that their testimony had been heard and understood by the end of the trial?
NOTES: _____
_____
_____
_____
_____
_____

Can you identify some ways that the judge maintained control of the proceedings?
NOTES: _____
_____
_____
_____
_____
_____

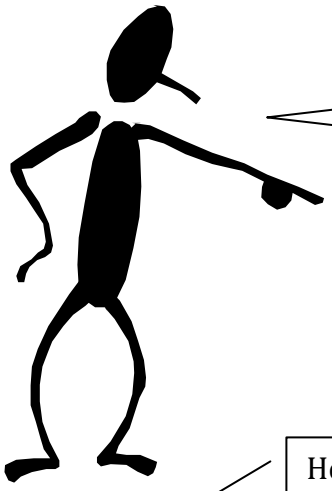
OVERVIEW



Before we allow a defendant to use the force of law to take away property belonging to another, we require every plaintiff to establish specific facts. We call these required facts

Essential Elements

Only after a plaintiff has introduced sufficient evidence to prove each individual element do we require a defendant to either rebut the evidence against her, or introduce additional evidence establishing an affirmative defense.



You injured me by
_____
_____
and so I'm suing you for
_____
_____
_____!!!!

Here are the essential elements of my case:

1. _____
2. _____
3. _____
4. _____

I am not responsible for your injury, because one of your essential elements is not true:
_____
_____
_____

OR

Even if everything you say is true, I'm STILL not responsible for your injury, because
_____
_____
_____

Insert Red Door, then 3 Doors, then rest of 10-minute guide

Breach of a Lease Condition

Lease contains a forfeiture clause.

Lewandowski/SO

1 "If tenant violates any material provision of this lease, the landlord has the right to declare it forfeit and to retake possession of the rental property."

Forfeiture clause applies to particular breach committed by Tenant.

"In the event that the landlord decides to terminate this lease, the landlord will deliver written notice of termination at least 7 days prior to termination."

3

Landlord followed lease procedure for forfeiture.

Lease

"No pets allowed. If you have a pet, you're outa here!"

Guess who stopped by?

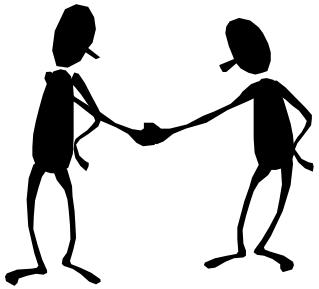
Defenses to Breach of a Lease Condition

LL didn't follow lease procedure

Waiver

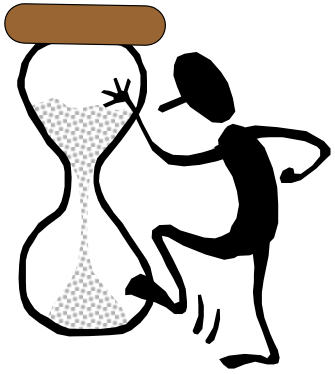
Failure To Pay Rent

No forfeiture clause in lease.



T failed to pay rent when due.

LL demanded the rent and waited 10 days before filing complaint.



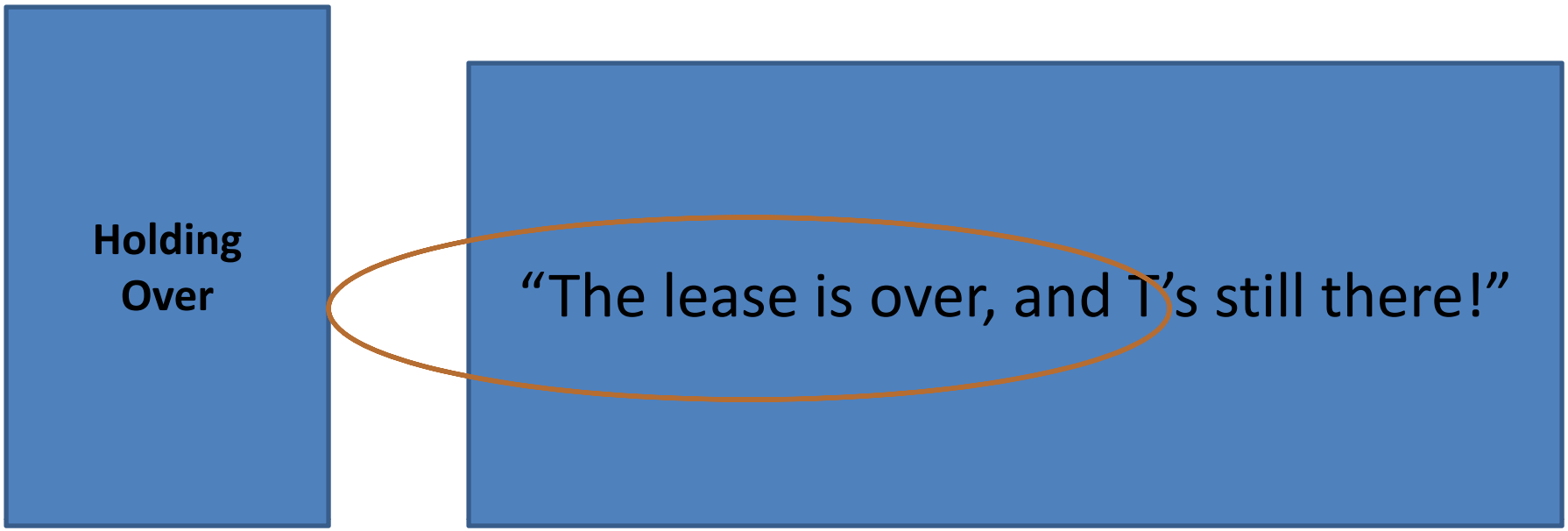
Common Defenses to Failure to Pay Rent

Lease has forfeiture clause.

Failure to make separate demand.

LL didn't wait long enough.

Tender



A lease ends when it says it ends.

If the lease specifies what the LL must do to end the lease, that's what the LL must do.

If the lease doesn't say when or how, the law controls the notice that must be given.

Defenses to Holding Over

Lease wasn't terminated.

Waiver

ACTIVITY: LISTENING FOR ESSENTIAL ELEMENTS IN A SUMMARY EJECTMENT ACTION

BREACH OF A LEASE CONDITION

Plaintiff/LL must prove:

___ existence of a landlord-tenant relationship;
___ lease contains a forfeiture clause;
___ tenant breached lease condition for which forfeiture is specified;
___ LL followed procedure set out in lease for declaring a forfeiture and terminating the lease.

Most common defenses: failure to follow proper procedure, waiver

FAILURE TO PAY RENT

Plaintiff/LL must prove:

___ existence of a landlord-tenant relationship;
___ terms of the lease related to obligation to pay rent;
___ lease does NOT contain forfeiture clause;
___ LL demanded that tenant pay rent on certain date;
___ LL waited at least 10 days after demand to file this action;
___ tenant has not yet paid the full amount due.

Most common defenses: failure to make proper demand and wait ten days, tender

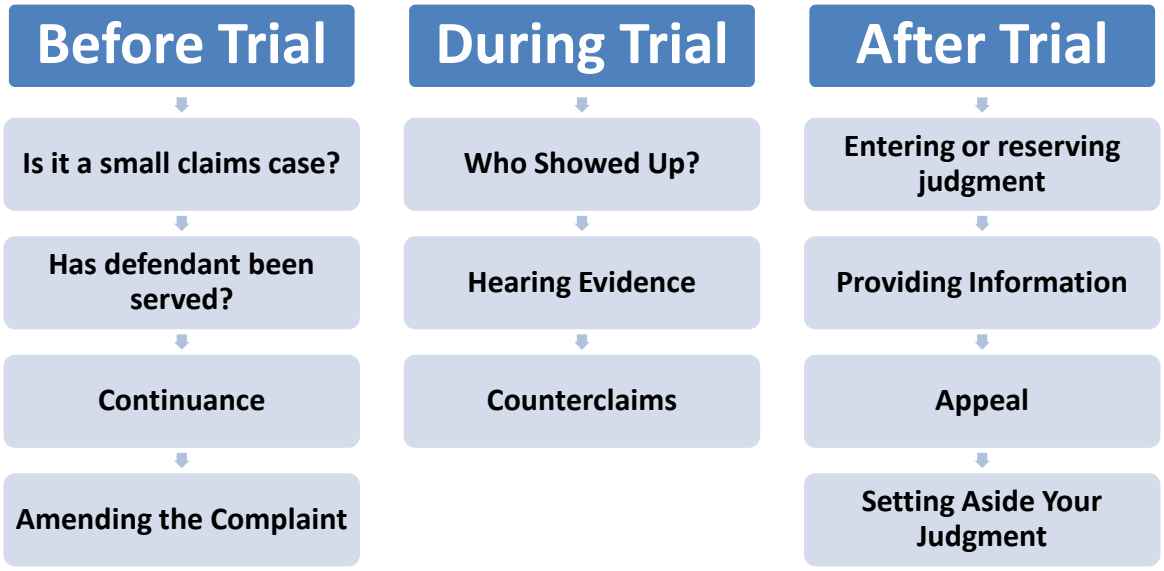
HOLDING OVER

Plaintiff/LL must prove:

___ existence of a landlord-tenant relationship;
___ terms of lease related to duration;
___ if lease is not for a fixed term, that proper notice was given of intent to terminate.

Most common defenses: waiver, improper notice.

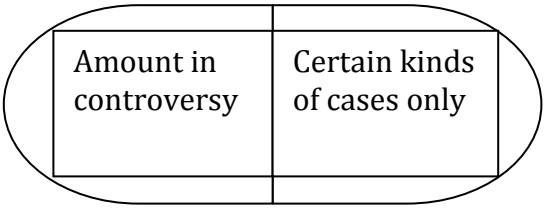
SMALL CLAIMS PROCEDURE



IS IT A SMALL CLAIMS CASE?

The law authorizes **you** to decide

small claims cases



assigned by your **chief district court judge**.

The law authorizes your chief district court judge to assign a case to small claims court if it otherwise meets the definition of a small claims case and if at least one defendant lives in the county.

AMOUNT IN CONTROVERSY RULES

1. If the plaintiff is asking for money, the amount must be $_____ or less.
2. The amount in controversy is determined as of the time _____

   _____
3. The plaintiff must ask for _____ of the amount he's entitled to for this particular claim. In other words, _____.
4. If the plaintiff is asking for return of personal property, the amount in controversy is _____.
5. In summary ejectment actions in which the landlord is seeking only possession, the amount in controversy requirement _____.

CERTAIN KINDS OF CASES ONLY

1. Actions for _____.
2. Actions to _____, either as a _____

   or as the _____.
3. Action in _____, defined as an action by a

   _____ against a _____

   to recover _____.

EXERCISE: IS IT A SMALL CLAIMS ACTION?

1. Susan paid Website Developers to design a website for her small business, but WD has refused to release the completed design so that Susan may actually put it on the web. Susan asks you to order WD to perform its part of the contract. Small claims action? _____

2. The Credit Union has brought an action alleging that defendant defaulted on a loan agreement and asking that you issue an order authorizing the CU to recover the amount owed from the defendant's other accounts. Small claims action? _____

3. Joe's Garage is prepared to sell a car to recover money owed under a storage lien, but the defendant refuses to turn over the key to the vehicle, and Mercedes won't provide a new key to anyone but the title owner. Joe anticipates problems selling the vehicle without being able to start the car, and asks that you order either the defendant to turn over the key, or DMV to transfer title. Small claims action? _____

4. Landlord Larry filed an action for summary ejectment and back rent in the amount of $5000. By the time the case gets to trial, the amount of unpaid back rent has increased to $5700. Small claims action? _____

5. Carl Creditor filed an action on a promissory note, which required Danny Debtor to repay a $5000 loan along with $750 in interest. Carl points out the amount in controversy statute contains language specifying that the amount is to be determined "exclusive of interest." Small claims action? _____

6. Randy Return has filed an action against Kelly Keepit to recover a fence Randy sold Kelly, but which Kelly never paid for. Small claims action? _____

7. Landlord Larry has filed an action in summary ejectment based on a rent-to-own contract providing that Barney Buyer would make monthly installment payments on a home, but if Barney misses a payment, the contract converts to a standard lease agreement and Larry will seek eviction based on failure to pay rent. Small claims action? _____

8. Graceful Greta tripped over an out-of-place lawnmower at Sears and has filed an action in your county against the store. Small claims action? _____

9. Nancy Newlywed and her husband Nick signed a contract to buy a lot of furniture from Happy Homes Furniture. Six months later, Nick's moved to Nebraska, and Happy Homes has filed an action against Nancy and Nick for the amount unpaid ($5000). Small claims action? _____

10. Actually, Happy Homes has filed two claims against Nick and Nancy, each for $5000, because the total amount due for all that furniture is $10,000. Is action #1 a small claims action? Action #2? _____.

HAS DEFENDANT BEEN SERVED?

-Service (or a legal substitute) is required before a judge has authority to decide a case.

-If the summons indicates the defendant was served, the presumption is that service was accomplished.

-If defendant files a motion before trial challenging personal jurisdiction, a district court judge must rule on that motion before the magistrate may proceed with the case.

-Service is not required if defendant makes a voluntary appearance, either by filing an answer or motion in the case, or if the defendant appears at trial.

-Special rule for service in summary ejectment actions: service by posting is sufficient to accomplish service of process allowing entry of judgment awarding possession only. Service by posting is NOT sufficient for award of money damages.

Problem: When you call a case for trial, you notice that defendant has not been served. Plaintiff is present in court, but defendant is not present. What should you do?

Same facts, but defendant is present. What should you do?

CONTINUANCES

EXERCISE:

When a judge grants a continuance, s/he is agreeing that the trial will be delayed. Assume that the judge in each situation below acted correctly. What legal rules about continuances can you deduce?

Situation 1: The judge discovers a written motion in the shuck, signed by both parties, asking that the case be continued for 1 week so that the parties may attempt to negotiate a settlement. The judge allows the motion.

Situation 2: Both parties appear in court and join in an oral motion asking that the court grant a one-week continuance so that they may attempt to reach a settlement. The judge allows the motion.

Situation 3: One party files a written motion asking for a continuance because the demands of his business are too pressing for him to have time to come to court. The judge denies the motion.

Situation 4: The defendant appears in court and agrees that he owes the plaintiff money. The defendant asks for a continuance, over the objection of the plaintiff, to allow him time to obtain the money he needs to pay. The judge denies the motion.

Situation 5: The defendant appears in an action for money owed and explains that he was served with the action yesterday. He asks for a continuance to give him more time to get ready for trial. The judge allows the motion.

Situation 6: The plaintiff in an action for money owed is surprised to learn that the court will not accept into evidence a letter from his mechanic containing an opinion about the work done by the defendant on the car, and asks for a continuance to bring his mechanic to court. Some judges allow the motion, while some don't.

Situation 7: In an action for money owed, the defendant agrees to pay the plaintiff what he owes by next week, and the plaintiff asks that you continue the case to see if the defendant actually comes up with the money. Some judges allow the motion, while some don't.

Situation 8: In a summary ejectment action held Wednesday morning, the magistrate notes that service by posting occurred yesterday. The defendant is not present in court. The magistrate continues the case to Friday on his own motion.

Based on these examples, answer the following questions:

1. Does the law require that a motion for a continuance be made in writing? _____
2. If the parties agree to a continuance, is the judge required to grant it? _____
3. What are some good reasons for granting a continuance?

_____
_____
_____
_____

4. What are some bad reasons for granting a continuance?

_____
_____
_____

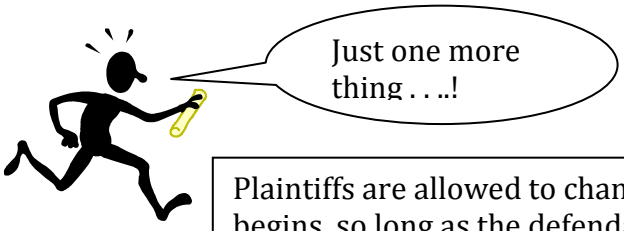
RULE: A CONTINUANCE MAY BE GRANTED ON REQUEST OF A PARTY OR UPON THE JUDGE'S OWN MOTION. EXCEPT FOR THE RARE CASE IN WHICH A CONTINUANCE IS MANDATORY, IT SHOULD BE GRANTED ONLY FOR GOOD CAUSE SHOWN. WHETHER GOOD CAUSE EXISTS LIES WITHIN THE SOUND DISCRETION OF THE JUDGE.

NOTE: In 2009 the General Assembly amended the law governing small claims procedure to establish a minimum time period between the time a defendant is served and the time of trial. Two different rules apply, depending upon whether the action is for summary ejectment or for another remedy. Because the amendment became effective after Brannon's book, Small Claims Law, was published, the book is not up-to-date in this one regard. For a memo explaining the amendments and recommending specific applications of the new law depending upon various factual circumstances, see the Appendix section of this notebook. While the issue is somewhat complicated, the basic rules established by the new laws are:

New Law

In a summary ejectment action, summons must be served at least two days prior to trial, excluding legal holidays.
In an action seeking a remedy other than summary ejectment, a continuance is mandatory if service of process occurred less than five days before trial.

AMENDING THE COMPLAINT



Plaintiffs are allowed to change – "amend"—their complaints even after trial begins, so long as the defendant has adequate notice and time to prepare a response. A small change—such as correcting the spelling of a name—requires little notice, while a significant change, such as asking for money instead of personal property, may require a continuance. Amendments are NOT allowed if they change the party being sued; in that case, the plaintiff must file another lawsuit and serve the proper defendant. An amendment can literally be handwritten on the complaint, and should be noted in the judgment.

NOTES: _____

WHO SHOWED UP

General Rule: A party may represent herself in small claims court, or she may be represented by an attorney.

General Rule #2: The plaintiff in a lawsuit must be the *real party in interest*—the person who has actually suffered injury.

EXERCISE: SHOULD YOU MAKE AN EXCEPTION?

1. Patsy Plaintiff is elderly and intimidated by the very thought of coming to court, so she brings her grandson Gary with her to present her evidence. Can Gary present the case, so long as Patsy is there to testify?

2. Patsy Plaintiff is still intimidated, so she brings her grandson with her, but this time she's prepared to prove that Gary has a power of attorney. Does a power of attorney authorize Gary to present her case in small claims court?

3. Patsy isn't going to give up. Due to her ill health and the fact that she often becomes confused, Gary has been appointed her legal guardian. The case is captioned Gary Grandson on behalf of Patsy Plaintiff vs. Dudley Defendant. Does a general guardianship authorize Gary to present her case?

4. Young Yolanda is 12 years old, and the clerk appointed her father as guardian ad litem when Yolanda filed this small claims action. Is Mr. Yolanda authorized to present the case on his daughter's behalf?

5. Larry Landlord lives in Louisiana, and he pays Michael Manger to act as his rental agent. Michael files a summary ejectment action against Tommy Tenant (Michael v. Tenant). Can Michael present the case? Can you enter judgment in favor of Michael?

6. When Larry Landlord sues Tommy Tenant for back rent and summary ejectment, Tommy hires Amanda Attorney to represent him in court. When you call the case, Amanda is present and prepared to proceed, but Tommy is out of town. Can you hear the case without Tommy?

7. Patsy Plaintiff brings an action against Mike's Mechanics, a sole proprietorship. Billy, an employee who handles the business end of the business, appears on behalf of Mike's Mechanics. Can Billy present the case for Mike's Mechanics?

8. Patsy sues Mike's Mechanics, Inc., and Billy appears on behalf of the corporation. Can Billy represent Mike's in this case?

HEARING EVIDENCE

No default judgment in small claims court.
Plaintiff must introduce enough evidence to demonstrate that each essential element of the case is probably true.

- Plaintiff always testifies first.

- Defendant has a right to ask questions, but often will choose simply to tell his or her story instead.
- Defendant does not have to introduce evidence (and actually may not even be present) unless plaintiff has produced enough evidence to win, assuming you believe that evidence to be true. This is called establishing a *prima facie* case.
- If plaintiff establishes a *prima facie* case, defendant has an opportunity to produce evidence either contradicting an element of plaintiff's case or establishing some affirmative reason plaintiff should not win.
- Defendant has the burden of proof on affirmative defenses.
- Magistrate decides degree of formality in courtroom.

RULES OF EVIDENCE

The rules of evidence are generally applied in small claims court.

- The hearsay rule is usually not strictly applied in small claims court, but the small claims judge should be fully aware that hearsay evidence is generally less credible than non-hearsay evidence.

- The best evidence rule requires that a party relying on a written document as the basis for a claim should produce the written document, as opposed to merely offering testimony about the document.

- The parol evidence rule is the name of a legal principle that prohibits a judge from considering evidence of oral statements made before or at the time of a written contract, unless the contract itself is unclear.

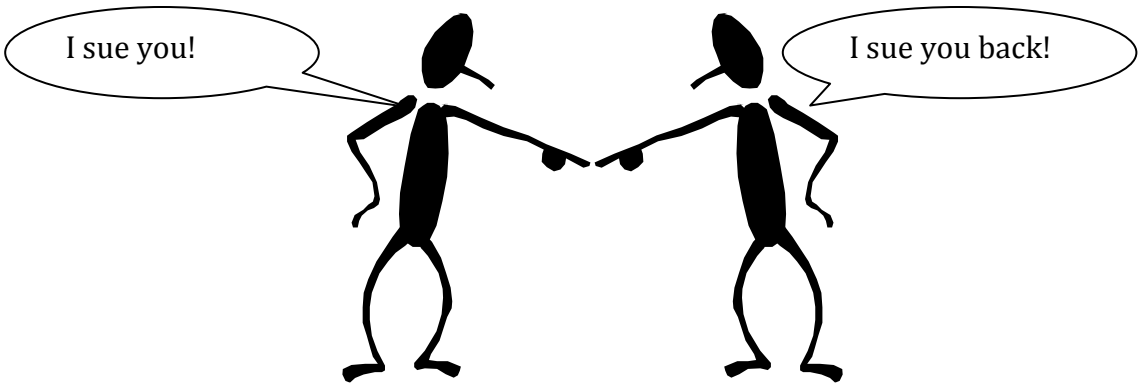
EXERCISE: HOW DO YOU RULE?

1. Landlord seeks summary ejectment based on breach of a lease condition prohibiting pets. Landlord testifies that the lease clearly states that the lease will be terminated if tenants are found to have a pet. At the end of landlord's evidence, the tenant asks that you dismiss the case. Do you? _____

2. Gymfabulous Health Club has filed an action for money owed against Fiona Fit based on her contractual agreement to pay $75/month for two years. Fiona testifies that before she signed the contract she specifically inquired about what would happen if she suffered injury and thus couldn't make use of her membership. She says she was assured that she would be released from her contract in this case. You tend to believe her. Can you refuse to rule in favor of plaintiff based on this defense? _____

3. Carl Creditor has brought an action against Danny Debtor for $500, based on a signed promissory note pursuant to which Danny agreed to repay a loan with interest (adding up to $4000) on or before April 1, 2010. Danny testifies that after he received the money he won the lottery, and he and Carl agreed that he could pay the entire loan off early for $3500. Carl argues that it doesn't matter: the evidence is undisputed that the promissory note was for $4000, that April 1 has arrived, and that Danny has paid only $3500. If you believe Danny, can you refuse to rule for Carl based on Danny's testimony about the modification in the agreement? _____

4. Mandy Motorist has filed an action for money damages arising out of an automobile accident that occurred when Mandy's car collided with Dudley's at a stoplight. Dudley has counterclaimed, alleging that the accident was Mandy's fault. The issue boils down to which party ran the red light. Mandy attempts to testify that immediately before the accident his girlfriend said, "Watch out—that guy's going to run the light!" Dudley's attorney objects, based on hearsay. Can you consider Mandy's testimony?
   _____



Rules for Counterclaims

1. Must be filed in clerk's office before time the case is set for trial.
2. Plaintiff is entitled to continuance if necessary to prepare a defense.
3. May not exceed $5000.
4. Treated just as though you're hearing two cases back-to-back.
5. You may either use two judgment forms, one attached to the other, or one judgment form, modifying as necessary.

After Trial

- Entering or reserving judgment
- Providing Informatation
- Appeal
- Setting Aside Your Judgment

EXERCISE: ARE YOU SMARTER THAN THE AVERAGE BEAR?

1. Is it better to refer to the parties as "plaintiff" and "defendant" when you announce your judgment, or to call them by name?

2. True or False: If you're not sure about the law, you can tell the parties that you'll make your decision later and promise to mail them a copy of the final judgment.

3. If you respond to questions about what happens after your judgment is filed with the clerk, should you be concerned about unauthorized practice of law?

4. Should you inform the losing party that s/he has the right to appeal?

5. If you intended to award plaintiff damages for pain and suffering, but forgot to include it in your calculations, can you change your judgment by adding it in, so long as you mail a copy of the final paperwork to the parties?

6. True or false: The parties must be represented by an attorney if they appeal to district court.

7. If the clerk notifies you that you overlooked lack of service in one case and entered judgment against the defendant (who was not present), what should you do?

8. Your chief district court judge has authorized you to hear Rule 60 motions to set aside small claims judgments. A defendant has made such a motion, saying that he missed court because he was involved in an accident. You believe him. What do you do?

EXERCISE: ENTERING JUDGMENT

As a judge, the heart of your job is making decisions. So it's not really surprising that how you communicate your decisions to the citizens affected by them is really important. Take a moment to think about what entering judgment looks like at its best---and at its worst. If you were advising a new magistrate about how to enter judgment, how would you complete the following sentences?

"Whatever you do, DON'T _____."

"One of the worst things I ever saw (or heard of) was a judge in small claims court who _____
_____"

"The most important part of entering judgment is _____
_____
_____"

SMALL CLAIMS PROCEDURE: WHAT MIGHT COME UP

Event	Legal Terminology	Important Concepts	Caution
One party wants more time			
π wants to change complaint			
π wants more than $5000			

Δ sues back			
π doesn't show up			
Δ doesn't show up			
No one shows up			
Someone other than π and Δ shows up			
π has changed his mind			

One party is corporation			
More than one defendant			
More than one plaintiff			
You made a mistake in your judgment			

DAY 2

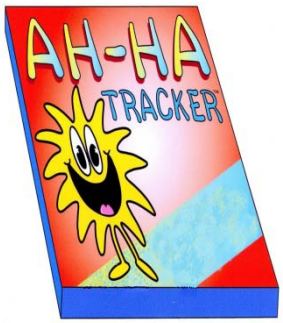
SCHEDULE FOR DAY 2

8:30 Checking-In
8:45 The Crux of Contracts
10:00 Break
10:15 Continuing with Contracts
12:30 Lunch at SOG
1:15 Small Group Discussion & Videotaping
4:30 Wrap-Up
4:45 Recess

OBJECTIVES FOR DAY 2

Our morning will be devoted to reviewing and applying basic contract law, including specific attention to determining damages for breach of contract and reviewing relevant consumer protection law.
After lunch, we'll spend the rest of the day in small-group discussions structured to allow magistrates to share their opinions and ideas on a wide variety of important topics, including dealing with pro se parties, judicial philosophy, magistrate-shopping, organizing your court to meet the unique needs of your county, managing attorneys, and many others. In addition, each magistrate will meet individually with Dona or Angela to conduct a mock trial. That trial will be videotaped, and the magistrate will review the tape with the instructor and receive feedback on his or her performance.

ACTIVITY: CHECK-IN



Discuss with your tablemates what struck you most about our time together yesterday. Do you have questions about any of the material? Did you come across anything that prompted you to consider modifying your approach to conducting court or deciding cases?

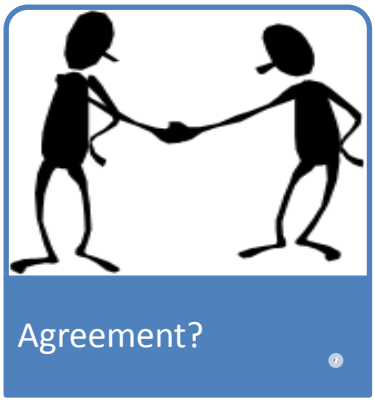
_____
_____
_____
_____
_____

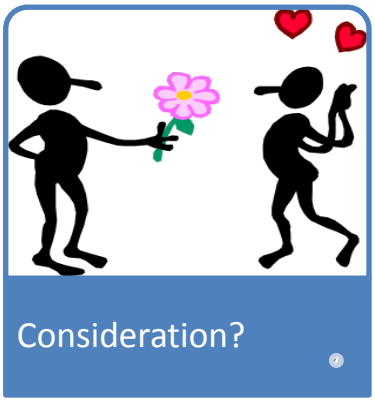
THE CRUX OF CONTRACTS

HOW TO ANALYZE A CONTRACTS CASE

1. Is there a contract?
2. Who are the parties to the contract?
3. What kind of contract is it?
4. What are its terms?
5. Did defendant breach the contract?
6. What damages is plaintiff entitled to?

IS THERE A CONTRACT?



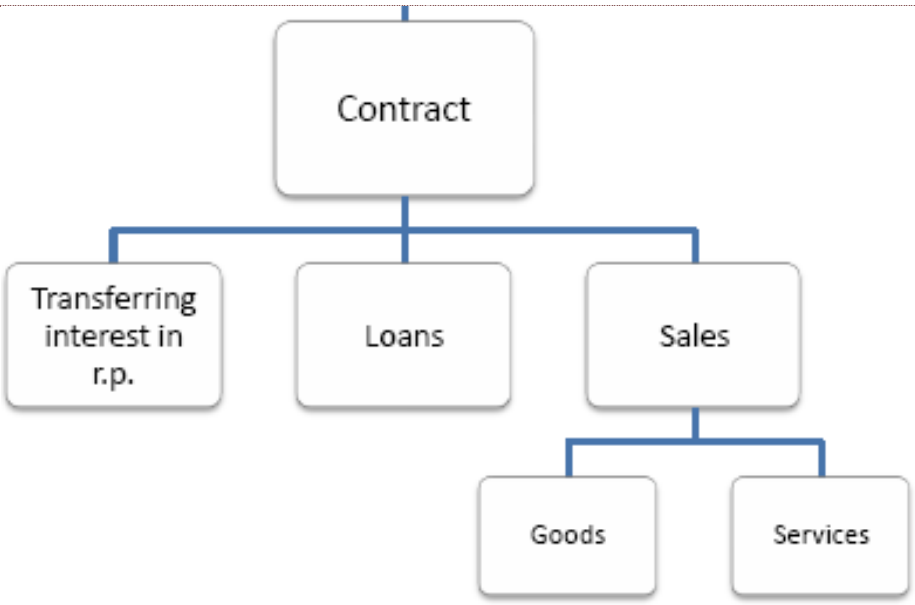


WHO ARE THE PARTIES TO THE CONTRACT?

Usually simple: WHO agreed?

Complicating matters:
- Agency
- Joint and several liability
- Guarantors
- Husbands, wives, and kids

WHAT KIND OF CONTRACT IS IT?



Examples

Sale of goods	Lease
Installment sales contract	Promissory note
Check	Security agreement
Contract for services	Option to purchase/ earnest money
Implied contract	Guaranty
Agency	Bailment

Special rules may apply to particular kinds of contracts.
Example: The law establishes a maximum amount of interest that may be charged by certain kinds of finance companies in connection with loans of certain amounts of money.
Can you think of another example?

_____

_____

WHAT ARE THE TERMS OF THE CONTRACT?

That starting place in any contract action is to enforce the agreement of the parties, so an essential first question is:

What, exactly, did the parties agree to?
In other words,
what were the terms of the contract?

STEP ONE: READ THE CONTRACT.

The rules of evidence are often applied in a somewhat relaxed fashion in small claims court, but there are two rules that are important to observe, both related to determining exactly what the terms of a contract are.

- *"The so-called "best evidence" rule . . . requires the exclusion of secondary evidence offered to prove the contents of a document whenever the document itself is available." U.S. Leasing Corp. v. Everett, 88 NC App. 418 (1988).*

- *"The parol evidence rule . . . prohibits the admission of parol evidence to vary, add to, or contradict a written instrument. . . . In substantive terms, the rule is stated as follows: 'Any or all parts of a transaction prior to or contemporaneous with a writing intended to record them finally are*

superseded and made legally ineffective by the writing.'" Van Harris Realty, Inc. v. Coffey, 41NC App 112 (1979).

ORAL CONTRACTS: ASSESSING CREDIBILITY

It's easy to see that when the evidence in a case consists solely of the contradictory testimony of the plaintiff and defendant, the magistrate's findings of fact will depend on which party s/he finds to be credible. Contrary to what some magistrates think, a judgment for plaintiff is permissible—but not mandatory—even in a "he-said/she-said" if the magistrate determines the plaintiff to be a credible witness. Probably even less well-understood is the fact that a judgment for plaintiff is not required even when the evidence is uncontradicted and establishes a *prima facie* case. If the magistrate finds the plaintiff's credibility to be weak and simply is not persuaded that the facts are PROBABLY as plaintiff says, a judgment for the plaintiff is not appropriate.

Determining Credibility: What Do You Think About?

- Motive to lie
- Corroborating evidence
- Demeanor
- Ability to testify to details
- Person in best position to observe
- Which version seems more likely

DAY 3

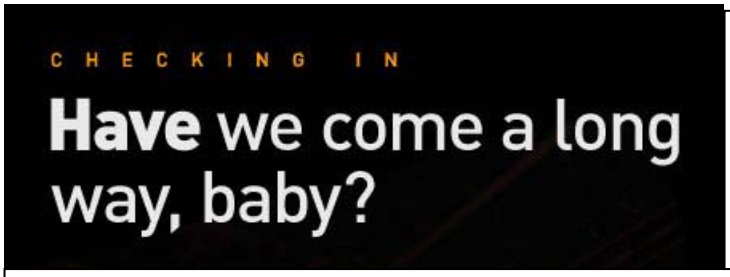
SCHEDULE FOR DAY 3

8:30 Checking-In
8:45 A Few More Things: Torts
10:00 Break
10:15 A Few More Things: Actions to Recover Possession
11:30 Mock Trial
12:00 Adjourn

OBJECTIVES FOR DAY 3

We're aiming for three goals as we complete the seminar today: first, we'll be discussing some of the most important rules about deciding cases involving torts, including determining damages and filling out the judgment form for these cases. Second, we'll build a bare-bones framework for analyzing actions to recover possession and then test our grasp of those basic principles. Finally, we will wrap up with a mock trial.

CHECKING IN



Small Claims Forms

(These and other forms can be found at the www.nccourts.org webpage)

AOC-CVM-100	Magistrate Summons
AOC-CVM-200	Complaint for Money Owed
AOC-CVM-201	Complaint in Summary Ejectment
AOC-CVM-202	Complaint to Recover Possession of Personal Property
AOC-CVM-203	Complaint To Enforce Possessory Lien On Motor Vehicle
AOC-CVM-400	Judgment In Action To Recover Money Or Personal Property
AOC-CVM-401	Judgment In Action For Summary Ejectment
AOC-CVM-402	Judgment In Action On Possessory Lien On Motor
AOC-G-108	Order

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
District Court Division - Small Claims

Plaintiff(s)

VERSUS

Defendant(s)

MAGISTRATE SUMMONS

☐ **ALIAS AND PLURIES SUMMONS**

G.S. 7A-217, -232; 1A-1, Rule 4

Date Original Summons Issued

Date(s) Subsequent Summons(es) Issued

TO:

Name And Address Of Defendant 1

TO:

Name And Address Of Defendant 2

A Small Claim Action Has Been Commenced Against You!

You are notified to appear before the magistrate at the specified date, time and location of trial listed below. You will have the opportunity at the trial to defend yourself against the claim stated in the attached complaint.

You may file a written answer, making defense to the claim, in the office of the Clerk of Superior Court at any time before the time set for trial. Whether or not you file an answer, the plaintiff must prove the claim before the magistrate.

If you fail to appear and defend against the proof offered, the magistrate may enter a judgment against you.

Date of Trial

Time Of Trial ☐ AM ☐ PM

Location Of Court

Name And Address Of Plaintiff Or Plaintiff's Attorney

Date Issued

Signature

☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

AOC-CVM-100, Rev. 4/01

(Over)

RETURN OF SERVICE

I certify that this Summons and a copy of the complaint were received and served as follows:

DEFENDANT 1

Date Served	*Time Served*	*Name Of Defendant*
	☐ AM ☐ PM	

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copy Left (If Corporation, Give Title Of Person Copy Left With)

☐ Other manner of service: *(specify).*

☐ Defendant WAS NOT served for the following reason:

DEFENDANT 2

Date Served	*Time Served*	*Name Of Defendant*
	☐ AM ☐ PM	

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copy Left (If Corporation, Give Title Of Person Copy Left With)

☐ Other manner of service: *(specify).*

☐ Defendant WAS NOT served for the following reason:

FOR USE IN SUMMARY EJECTMENT CASES ONLY

☐ Service was made by mailing by first class mail a copy of the summons and complaint to the defendant(s) and by posting a copy of the summons and complaint at the following premises.

Date Served	*Name(s) Of The Defendant(s) Served By Posting*
Address Of Premises Where Posted	
Service Fee $	*Signature Of Deputy Sheriff Making Return*
Date Received	*Name Of Sheriff (Type Or Print)*
Date Of Return	*County Of Sheriff*

AOC-CVM-100, Side Two, Rev. 4/01

File No.

COMPLAINT FOR MONEY OWED

G.S. 7A-216, 7A-232

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division-Small Claims

1. The defendant is a resident of the county named above.
2. The defendant owes me the amount listed for the following reason:

Principal Amount Owed	$
Interest Owed *(if any)*	$
Total Amount Owed	$ 0.00

(check one below)

☐ On An Account *(attach a copy of the account)*	*Date From Which Interest Due*		*Interest Rate*
☐ For Goods Sold And Delivered Between	*Beginning Date*	*Ending Date*	*Interest Rate*
☐ For Money Lent	*Date From Which Interest Due*		*Interest Rate*
☐ On a Promissory Note *(attach copy)*	*Date Of Note*	*Date From Which Interest Due*	*Interest Rate*

☐ For a Worthless Check *(attach a copy of the check)*

☐ For conversion *(describe property)*

☐ Other: *(specify)*

I demand to recover the total amount listed above, plus interest and reimbursement for court costs.

Date	*Signature Of Plaintiff Or Attorney*

Name And Address Of Plaintiff

County	*Telephone No.*

VERSUS

Name And Address Of Defendant 1 ☐ *Individual* ☐ *Corporation*

County	*Telephone No.*

Name And Address Of Defendant 2 ☐ *Individual* ☐ *Corporation*

County	*Telephone No.*

Name And Address Of Plaintiff's Attorney

Forms-Pg 5

(Over)

INSTRUCTIONS TO PLAINTIFF OR DEFENDANT

1. The PLAINTIFF must file a small claim action in the county where at least one of the defendants resides.

2. The PLAINTIFF cannot sue in small claims court for more than $5,000.00 excluding interest and costs.

3. The PLAINTIFF must show the complete name and address of the defendant to ensure service on the defendant. If there are two defendants and they reside at different addresses, the plaintiff must include both addresses. The plaintiff must determine if the defendant is a corporation and sue in the complete corporate name. If the business is not a corporation, the plaintiff must determine the owner's name and sue the owner.

4. The PLAINTIFF may serve the defendant(s) by mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, addressed to the party to be served or by paying the costs to have the sheriff serve the summons and complaint. If certified or registered mail is used, the plaintiff must prepare and file a sworn statement with the Clerk of Superior Court proving service by certified mail and must attach to that statement the postal receipt showing that the letter was accepted.

5. The PLAINTIFF must pay advance court costs at the time of filing this Complaint. In the event that judgment is entered in favor of the plaintiff, court costs may be charged against the defendant.

6. The DEFENDANT may file a written answer, making defense to the claim, in the office of the Clerk of Superior Court. This answer should be accompanied by a copy for the plaintiff and be filed no later than the time set for trial. The filing of the answer DOES NOT relieve the defendant of the need to appear before the magistrate to assert the defendant's defense.

7. Whether or not an answer is filed, the PLAINTIFF must appear before the magistrate.

8. The PLAINTIFF or the DEFENDANT may appeal the magistrate's decision in this case. To appeal, notice must be given in open court when the judgment is rendered, or notice may be given in writing to the Clerk of Superior Court within ten (10) days after the judgment is rendered. If notice is given in writing, the appealing party must also serve written notice of appeal on all other parties. The appealing party must PAY to the Clerk of Superior Court the costs of court for appeal within twenty (20) days after the judgment is rendered.

9. This form is supplied in order to expedite the handling of small claims. It is designed to cover the most common claims.

10. **The Clerk or magistrate cannot advise you about your case or assist you in completing this form. If you have any questions, you should consult an attorney.**

AOC-CVM-200, Rev. 2/06

File No.

COMPLAINT IN SUMMARY EJECTMENT

G.S. 7A-216, 7A-232; Ch. 42, Art. 3 and 7

Name And Address Of Plaintiff

County | Telephone No.

VERSUS

Name And Address Of Defendant 1 ☐ Individual ☐ Corporation

County | Telephone No.

Name And Address Of Defendant 2 ☐ Individual ☐ Corporation

County | Telephone No.

Name And Address Of Plaintiff's Attorney Or Agent

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division-Small Claims

1. The defendant is a resident of the county named above.
2. The defendant entered into possession of premises described below as a lessee of plaintiff.

Description Of Premises (Include Location) | ☐ Conventional ☐ Public Housing ☐ Section 8

Rate Of Rent $ per ☐ Month ☐ Week | Date Rent Due | Date Lease Ended | Type Of Lease ☐ Oral ☐ Written

3. ☐ The defendant failed to pay the rent due on the above date and the plaintiff made demand for the rent and waited the 10-day grace period before filing the complaint.
   ☐ The lease period ended on the above date and the defendant is holding over after the end of the lease period.
   ☐ The defendant breached the condition of the lease described below for which re-entry is specified.
   ☐ Criminal activity or other activity has occurred in violation of G.S. 42-63 as specified below.

Description Of Breach/Criminal Activity (give names, dates, places and illegal activity)

4. The plaintiff has demanded possession of the premises from the defendant, who has refused to surrender it, and the plaintiff is entitled to immediate possession.
5. The defendant owes the plaintiff the following:

Description Of Any Property Damage

Amount Of Damage (If Known) $ | Amount Of Rent Past Due $ | Total Amount Due $ 0.00

6. I demand to be put in possession of the premises and to recover the total amount listed above and daily rental until entry of judgment plus interest and reimbursement for court costs.

Date | Signature Of Plaintiff/Attorney/Agent

CERTIFICATION WHEN COMPLAINT SIGNED BY AGENT OF PLAINTIFF

I certify that I am an agent of the plaintiff and have actual knowledge of the facts alleged in this Complaint.

Date | Signature

Forms-Pg 7

AOC-CVM-201, Rev. 2/06

(Over)

INSTRUCTIONS TO PLAINTIFF OR DEFENDANT

1. The PLAINTIFF must file a small claim action in the county where at least one of the defendants resides.

2. The PLAINTIFF cannot sue in small claims court for more than $5,000.00 excluding interest and costs.

3. The PLAINTIFF must show the complete name and address of the defendant to ensure service on the defendant. If there are two defendants and they reside at different addresses, the plaintiff must include both addresses. The plaintiff must determine if the defendant is a corporation and sue in the complete corporate name. If the business is not a corporation, the plaintiff must determine the owner's name and sue the owner.

4. The PLAINTIFF may serve the defendant(s) by mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, addressed to the party to be served or by paying the costs to have the sheriff serve the summons and complaint. If certified or registered mail is used, the plaintiff must prepare and file a sworn statement with the Clerk of Superior Court proving service by certified mail and must attach to that statement the postal receipt showing that the letter was accepted.

5. In filling out number 3 in the complaint, if the landlord is seeking to remove the tenant for failure to pay rent when there is no written lease, the first block should be checked. (Defendant failed to pay the rent due on the above date and the plaintiff made demand for the rent and waited the ten (10) day grace period before filing the complaint.) If the landlord is seeking to remove the tenant for failure to pay rent when there is a written lease with an automatic forfeiture clause, the third block should be checked. (The defendant breached the condition of the lease described below for which re-entry is specified.) And "failure to pay rent" should be placed in the space for description of the breach. If the landlord is seeking to evict tenant for violating some other condition in the lease, the third block should also be checked. If the landlord is claiming that the term of the lease has ended and the tenant refuses to leave, the second block should be checked. If the landlord is claiming that criminal activity occurred, the fourth block should be checked and the conduct must be described in space provided.

6. The PLAINTIFF must pay advance court costs at the time of filing this Complaint. In the event that judgment is rendered in favor of the plaintiff, court costs may be charged against the defendant.

7. The PLAINTIFF must appear before the magistrate to prove his/her claim.

8. The DEFENDANT may file a written answer, making defense to the claim, in the office of the Clerk of Superior Court. This answer should be accompanied by a copy for the plaintiff and be filed no later than the time set for trial. The filing of the answer DOES NOT relieve the defendant of the need to appear before the magistrate to assert the defendant's defense.

9. The PLAINTIFF or the DEFENDANT may appeal the magistrate's decision in this case. To appeal, notice must be given in open court when the judgment is entered, or notice may be given in writing to the Clerk of Superior Court within ten (10) days after the judgment is entered. If notice is given in writing, the appealing party must also serve written notice of appeal on all other parties. The appealing party must PAY to the Clerk of Superior Court the costs of court for appeal within twenty (20) days after the judgment is entered.

10. If the defendant appeals and wishes to remain on the premises the defendant must also post a stay of execution bond within ten (10) days after the judgment is entered.

11. This form is supplied in order to expedite the handling of small claims. It is designed to cover the most common claims.

12. **The Clerk or magistrate cannot advise you about your case or assist you in completing this form. If you have any questions, you should consult an attorney.**

AOC-CVM-201, Side Two, Rev. 2/06

File No.

COMPLAINT TO RECOVER POSSESSION OF PERSONAL PROPERTY

☐ PLAINTIFF A SECURED PARTY

☐ PLAINTIFF NOT A SECURED PARTY

G.S. 7A-232; 25-9-609

Name And Address Of Plaintiff

Social Security No./Taxpayer ID No.

County | Telephone No.

VERSUS

Name And Address Of Defendant 1 ☐ Individual ☐ Corporation

County | Telephone No.

Name And Address Of Defendant 2 ☐ Individual ☐ Corporation

County | Telephone No.

Name And Address Of Plaintiff's Attorney

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division-Small Claims

WHEN PLAINTIFF IS A SECURED PARTY

The defendant is a resident of the county named above. I have a security interest in the personal property described in the attached security agreement. The total current value of this property is as shown below. The defendant has defaulted in the payment of the debt which the property secures or has otherwise breached the terms of the security agreement giving me the right to claim immediate possession of the property described below. I demand recovery of this property and reimbursement for court costs.

Description Of Personal Property In Which You Have a Secured Interest (Attach Copy Of Security Agreement) | Total Value Of Property To Be Recovered $

Date | Signature Of Plaintiff Or Attorney

WHEN PLAINTIFF IS NOT A SECURED PARTY

The defendant is a resident of the county named above. The defendant has in his/her possession the personal property described below which belongs to me. I am entitled to immediate possession of the property, but the defendant has refused on demand to deliver it to me. The defendant has unlawfully kept possession of this property since the date listed below and has therefore deprived me of its use. The damage due me for the loss of use and physical damage to the property is set out below. I demand recovery of this property and damages in the total amount set out below, plus interest and reimbursement for court costs.

Description Of Personal Property You Own Which Is In Possession Of Defendant | Total Value Of Property To Be Recovered $

Date Defendant Wrongfully Took Or Kept Property

Damage Due For Loss Of Use $

Physical Damage To Property $

Total Amount Of Damages $ 0.00

Date | Signature Of Plaintiff Or Attorney

Forms-Pg 9

Original-File Copy-Each Defendant Copy-Attorney/Plaintiff
(Over)

INSTRUCTIONS TO PLAINTIFF OR DEFENDANT

1. The PLAINTIFF must file a small claim action in the county where at least one of the defendants resides.

2. The PLAINTIFF cannot sue to recover property worth more than $5,000.00.

3. The PLAINTIFF must show the complete name and address of the defendant to ensure service on the defendant. If there are two defendants and they reside at different addresses, the plaintiff must include both addresses. The plaintiff must determine if the defendant is a corporation and sue in the complete corporate name. If the business is not a corporation, the plaintiff must determine the owner's name and sue the owner.

4. The PLAINTIFF may serve the defendant(s) by mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, addressed to the party to be served or by paying the costs to have the sheriff serve the summons and complaint. If certified or registered mail is used, the plaintiff must prepare and file a sworn statement with the Clerk of Superior Court proving service by certified mail and must attach to that statement the postal receipt showing that the letter was accepted.

5. The PLAINTIFF must pay advance court costs at the time of filing this Complaint. In the event that judgment is rendered in favor of the plaintiff, court costs may be charged against the defendant.

6. The DEFENDANT may file a written answer, making defense to the claim, in the office of the Clerk of Superior Court. This answer should be accompanied by a copy for the plaintiff and be filed no later than the time set for trial. The filing of the answer DOES NOT relieve the defendant of the need to appear before the magistrate to assert the defendant's defense.

7. Whether or not an answer is filed, the PLAINTIFF must appear before the magistrate.

8. The PLAINTIFF or the DEFENDANT may appeal the magistrate's decision in this case. To appeal, notice must be given in open court when the judgment is entered, or notice may be given in writing to the Clerk of Superior Court within ten (10) days after the judgment is entered. If notice is given in writing, the appealing party must also serve written notice of appeal on all other parties. The appealing party must PAY to the Clerk of Superior Court the costs of court for appeal within twenty (20) days after the judgment is entered. A defendant who appeals also must post a bond to stay execution of the judgment within ten (10) days after the judgement is entered.

9. This form is supplied in order to expedite the handling of small claims. It is designed to cover the most common claims.

10. The Clerk or magistrate cannot advise you about your case or assist you in completing this form. If you have any questions, you should consult an attorney.

AOC-CVM-202, Rev. 10/04

File No.

COMPLAINT TO ENFORCE POSSESSORY LIEN ON MOTOR VEHICLE

G.S. 7A-211.1; 20-77(d), 44A-2(d), 44A-4(b)(e)

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division-Small Claims

Name And Address Of Plaintiff

County	Telephone No.

VERSUS

Name And Address Of Defendant 1

County	Telephone No.

Name And Address Of Defendant 2

County	Telephone No.

Name And Address Of Plaintiff's Attorney

1. The lien claimed arose in the county named above.

2a. ☐ I repair, service, tow or store motor vehicles in the ordinary course of business.

b. ☐ I am an operator of a place of business for garaging or parking motor vehicles for the public and the motor vehicle listed below has remained unclaimed for at least 10 days.

c. ☐ I am a landowner on whose property the motor vehicle listed below has been abandoned for at least 30 days. The property was not left by a tenant. [G.S. 42-25.9(g); 44A-2(e2)]

3. I came into possession of the motor vehicle described on the date shown below, am in possession of the vehicle, and claim a possessory lien on this vehicle for the amounts indicated below plus storage at the rate indicated from this date until the lien is satisfied.

Make/Year Of Vehicle

ID Number	Repairs	$
Date Of Possession	Towing	$
Date Storage Began	Storage Cost to Date	$
Date Notice Of Unclaimed Vehicle Given	Vehicle Rental	$
(Plus Storage @ $ _____ Per Day Until Sold)	**Total Lien Claimed To Date**	$ 0.00

4. The defendants are the registered owner of the vehicle and the known secured party(ies).

5. I gave notice of an unclaimed vehicle to the Division of Motor Vehicles on the date listed above.

6. I have given notice to the North Carolina Division of Motor Vehicles that a lien is asserted, and sale is proposed for the above described motor vehicle.

I demand that this Court declare the lien valid and enforceable by sale and order that the North Carolina Division of Motor Vehicles transfer title to the person who purchases at the sale upon proof that proper notice of sale has been given.

Date	Signature Of Plaintiff Or Attorney

AOC-CVM-203, Rev. 3/05

(Over)

INSTRUCTIONS TO PLAINTIFF OR DEFENDANT

1. Before filing this Complaint, you must have filed certain forms with the Division of Motor Vehicles. Contact your local Division of Motor Vehicles office.

2. The PLAINTIFF must file a small claim action in the county where the claim arose (i.e. where the motor vehicle was repaired, towed or stored).

3. The PLAINTIFF cannot sue in small claims court if the lien is for more than $5,000.00.

4. The registered owner of the vehicle and any secured parties listed with the Division of Motor Vehicles must be made defendants in the case. The PLAINTIFF must show the complete name and address of the defendant to ensure service on the defendant. If there are two defendants and they reside at different addresses, the plaintiff must include both addresses. The plaintiff must determine if the defendant is a corporation and sue in the complete corporate name.
   If the business is not a corporation, the plaintiff must determine the owner's name and sue him/her.

5. The PLAINTIFF may serve the defendant(s) by mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, addressed to the party to be served or by paying the costs to have the sheriff serve the summons and complaint. If certified or registered mail is used, the plaintiff must file a sworn statement with the Clerk of Superior Court proving service by certified mail and must attach to that statement the postal receipt showing that the letter was accepted. If the name or address of the vehicle owner cannot be determined, service by publication is authorized. In that case plaintiff may want to consult an attorney.

6. The PLAINTIFF must pay advance court costs at the time of filing this Complaint. In the event that judgment is rendered in favor of the plaintiff, court costs may be charged against the defendant.

7. The DEFENDANT may file a written answer, making defense to the claim, in the office of the Clerk of Superior Court. This answer should be accompanied by a copy for the plaintiff and be filed no later than the time set for trial. The filing of the answer DOES NOT relieve the defendant of the need to appear before the magistrate to assert the defendant's defense.

8. Whether or not an answer is filed, the PLAINTIFF must appear before the magistrate.

9. The PLAINTIFF or the DEFENDANT may appeal the magistrate's decision in this case. To appeal, notice must be given in open court when the judgment is rendered, or notice may be given in writing to the Clerk of Superior Court within ten (10) days after the judgment is rendered. If notice is given in writing, the appealing party must also serve written notice of appeal on all other parties. The appealing party must PAY to the Clerk of Superior Court the costs of court for appeal within twenty (20) days after the judgment is rendered.

   This form is supplied in order to expedite the handling of small claims. It is designed to cover the most common claims. Questions about the adequacy of this form or whether it is the appropriate form to be used should be addressed to an attorney.

AOC-CVM-203, Side Two, Rev. 3/05

File No.

Film No.

Judgment Docket Book And Page No.

JUDGMENT IN ACTION TO RECOVER MONEY OR PERSONAL PROPERTY

G.S. 7A-210(2), 7A-224

Name And Address Of Plaintiff

County	Telephone No.

VERSUS

Name And Address Of Defendant 1

County	Telephone No.

Name And Address Of Defendant 2

County	Telephone No.

Name And Address Of Plaintiff's Attorney

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division-Small Claims

This action was tried before the undersigned on the cause stated in the complaint. The record shows that the defendant was given proper notice of the nature of the action and the date, time and location of trial.

FINDINGS

The Court finds:

☐ that the plaintiff has proved the case by the greater weight of the evidence.

☐ that the plaintiff has failed to prove the case by the greater weight of the evidence.

that the defendant(s) ☐ was ☐ was not present at trial.

☐ Other:

ORDER

It is ORDERED that:

☐ the plaintiff recover possession of the personal property described in the complaint.

☐ the plaintiff recover possession of the personal property listed below:

☐ the plaintiff recover nothing of the defendant(s) and that this action be dismissed with prejudice.

☐ *(for breach of contract cases)* the plaintiff recover of the defendant(s) the following principal sum and interest accrued to the date of the judgment, plus interest at the legal rate on the principal sum from this day until judgment is satisfied.

☐ *(for tort cases)* the plaintiff recover of the defendant(s) the following principal sum, plus interest at the legal rate from the date the action was instituted until judgment is satisfied.

☐ Other: *(specify)*

☐ Costs of this action are taxed to the ☐ plaintiff. ☐ defendant.

Principal Sum Of Judgment	$	Name Of Judgment Debtor(s) From Whom Amount Recovered
Amount Of Interest Not Included In Principal	$	☐ Judgment Announced And Signed In Open Court
Attorney's Fees Or Other Damages *(when appropriate)*	$	Date / Signature Of Magistrate
TOTAL AMOUNT	$ 0.00	Name Of Party Announcing Appeal In Open Court

CERTIFICATION

(**NOTE:** *To be used when magistrate does not announce and sign this Judgment in open court at the conclusion of the trial.*)
I certify that this Judgment has been served on each party named by depositing a copy in a post-paid properly addressed envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service.

Date	Signature Of Magistrate

AOC-CVM-400, Rev. 2/06

File No.	Abstract No.
Film No.	
Judgment Docket Book And Page No.	

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division-Small Claims

This action was tried before the undersigned on the cause stated in the complaint. The record shows that the defendant was given proper notice of the nature of the action and the date, time and location of trial.

JUDGMENT IN ACTION FOR SUMMARY EJECTMENT

G.S. 7A-210(2), 7A-224; 42-30

Name And Address Of Plaintiff

County	Telephone No.

VERSUS

Name And Address Of Defendant 1

County	Telephone No.

Name And Address Of Defendant 2

County	Telephone No.

Name And Address Of Plaintiff's Attorney

FINDINGS

The Court finds that:

1. ☐ a. the plaintiff has proved the case by the greater weight of the evidence.
   ☐ b. the plaintiff has failed to prove the case by the greater weight of the evidence.
   ☐ c. the plaintiff requested and was entitled to a judgment for possession based on the pleading.
2. the defendant(s) ☐ was ☐ was not present. ☐ The defendant was served by postings.
3. ☐ a. there is no dispute as to the amount of rent in arrears, and the amount is $ _____ .
   ☐ b. there is an actual dispute as to the amount of rent in arrears. The defendant(s) claims the amount of rent in arrears is $ _____, and this amount is the undisputed amount of rent in arrears.
4. other:

ORDER

It is ORDERED that:

☐ 1. the defendant(s) be removed from and the plaintiff be put in possession of the premises described in the complaint.
☐ 2. this action be dismissed with prejudice.
☐ 3. this action be dismissed with prejudice because the defendant tendered the rent due and the court costs of this action.
☐ 4. the plaintiff recover rent of the defendant(s) in the amount and at the rate listed below, plus other damages in the amount indicated. The plaintiff is also entitled to interest on the total principal sum from this date until the judgment is paid.
☐ 5. other: *(specify)*

☐ 6. costs of this action are taxed to the ☐ plaintiff. ☐ defendant.

Rate Of Rent	Amt. Of Rent In Arrears (Owed To Date)	
$ per ☐ Mo. ☐ Wk.	$	☐ Judgment Announced And Signed In Open Court
Amount Of Other Damages $	Date	Signature Of Magistrate
TOTAL AMOUNT $ 0.00	Name Of Party Announcing Appeal In Open Court	

CERTIFICATION

(**NOTE:** *To be used when magistrate does not announce and sign this Judgment in open court at the conclusion of the trial.)*
I certify that this Judgment has been served on each party named by depositing a copy in a post-paid properly addressed envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service.

Date	Signature Of Magistrate

Forms-Pg 15

File No.

Film No.

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division-Small Claims

JUDGMENT IN ACTION ON POSSESSORY LIEN ON MOTOR VEHICLE

G.S. 44A-4

This action was tried before the undersigned on the cause stated in the complaint. The record shows that the defendant was given proper notice of the nature of the action and the date, time and location of trial.

FINDINGS

The Court finds that:

☐ 1. the plaintiff has failed to prove the case by the greater weight of the evidence.

☐ 2. the plaintiff ☐ repairs, services, tows or stores motor vehicles in the ordinary course of business ☐ is the operator of a place of business for garaging or parking vehicles ☐ is a landowner on whose property the vehicle listed was abandoned and the plaintiff came into possession of the motor vehicle on the date shown below, is still in possession, and has a valid enforceable lien against the motor vehicle for the amount indicated, plus storage at the rate below from the date of this Judgment until the lien is satisfied.

3. the defendant(s) ☐ was ☐ was not present at trial.

4. The lienor has given proper notice to the North Carolina Division of Motor Vehicles that a lien is asserted and sale is proposed for the vehicle.

Name And Address Of Plaintiff

County | *Telephone No.*

VERSUS

Name And Address Of First Defendant

County | *Telephone No.*

Name And Address Of Second Defendant

County | *Telephone No.*

Name And Address Of Plaintiff's Attorney

Make/Year Of Vehicle

ID Number

Date Of Possession

(Plus Storage @ $ Per Day Until Sold)

Repairs	$
Towing	$
Storage Cost to Date	$
Vehicle Rental	$
Total Lien Claimed To Date	$ 0.00

ORDER

It is ORDERED that:

☐ the plaintiff recover nothing of the defendant and that this action be dismissed with prejudice.

☐ the lien is valid and enforceable by sale and the Division of Motor Vehicles shall transfer title to the person who purchases at the sale upon proof that proper notice of sale has been given.

☐ Judgment Announced And Signed In Open Court

Name Of Party Announcing Appeal In Open Court | *Date* | *Signature Of Magistrate*

CERTIFICATION

(**NOTE:** *To be used when magistrate does not announce and sign this Judgment in open court at the conclusion of the trial.*)
I certify that this Judgment has been served on each party named by depositing a copy in a post-paid properly addressed envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service.

Date | *Signature Of Magistrate*

STATE OF NORTH CAROLINA

_____ County

File No.

Film No.

In The General Court Of Justice

☐ District ☐ Superior Court Division ☐ Small Claims

Name Of Plaintiff/Petitioner	**ORDER**
VERSUS	
Name Of Defendant/Respondent	

☐ DISMISSAL ☐ With Prejudice ☐ Without Prejudice

This action is dismissed for the following reason:

☐ The plaintiff elected not to prosecute this action and has moved for dismissal.

☐ Neither the plaintiff, nor the defendant appeared on the scheduled trial date.

☐ The plaintiff failed to appear on the scheduled trial date; the defendant did appear on that date and has moved to dismiss this action.

☐ Other:

☐ DISCONTINUANCE [G.S. 1A-1, Rule 4(e)]

The defendant has never been served in this action, and more than ninety (90) days have elapsed since the last summons was issued.

☐ CONTINUANCE

The trial of this action is continued to the following date and time on motion of the

☐ Plaintiff

☐ Defendant

☐ Judge or Magistrate

☐ Other: *(specify)*

Date Of New Trial	*Time Of New Trial* ☐ AM ☐ PM	*Location Of New Trial*

☐ BANKRUPTCY

It is ordered that this action be removed from the active calendar and placed on inactive status because a petition for bankruptcy has been filed staying this proceeding. This action may be reinstated if the claim is not resolved in the U.S. Bankruptcy or District Courts.

Date	*Signature*	☐ *Judge* ☐ *Magistrate* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

AOC-G-108, Rev. 11/02

APPENDIX

Small Claims for Newbies: Contents

Basic School: Small Claims Review

I. Procedure
   A. Small Claims Action
      i. Summary Ejectment, $ Owed, or Return of Personal Property
      ii. $5,000 or less
      iii. At least one defendant must reside in county

   B. Service of Process
      i. Personal service by sheriff
      ii. Certified mail, return receipt requested
      iii. Voluntary appearance
      iv. (SE cases only: Service by posting)

   C. Counterclaim
      i. Must be filed with clerk prior to time case is set for trial
      ii. Written
      iii. For $5000 or less

   D. Continuance
      i. Both parties agree: allowed
      ii. Motion by one party: allow only for good cause shown

   E. Failure to appear
      i. By defendant: Take plaintiff's testimony just as usual
      ii. By plaintiff: dismiss with prejudice

   F. Amendment of complaint
      i. Freely allowed
      ii. Usually only issue is whether defendant has sufficient notice

   G. Voluntary dismissal (without prejudice)
      i. Plaintiff has the right to take a voluntary dismissal at any time before conclusion of plaintiff's evidence

   H. Entering judgment
      i. May reserve judgment for up to 10 days
      ii. Party may give notice of appeal in open court, or by seeing clerk

   I. Clerical errors: judge may correct without notice to parites

   J. Rule 60(b) motions to set aside judgment for excusable neglect
      i. Must be authorized by CDCJ to hear these motions
      ii. Requires notice to other party and hearing
      iii. If motion by defendant, must also show meritorious defense

II. Torts:
   A. In negligence cases In North Carolina, contributory negligence is a complete defense.
   B. Conversion is an intentional tort, in which the plaintiff proves:
      i. Plaintiff is the owner or lawful possessor of property;
      ii. Defendant wrongfully took or wrongfully retained that property;
      iii. Conversion, sometimes referred to as "forced sale," entitles the plaintiff to recover the fair market value of the property at the time and place of conversion as well as interest on that amount.

III. Contracts
   A. Bargained-for exchange

   B. Contracts by minors
      i. Voidable at the option of the minor
      ii. Exception: contracts for necessaries

   C. Statutes of limitation
      i. Contracts for the sale of goods: 4 years
      ii. Other contracts: 3 years
      iii. Contracts under seal: 10 years
      iv. NOTE: Partial payment on account starts statute running over again. A creditor who accepts partial payment of a debt does not waive the right to bring an action for the remainder of a debt.

   D. Contracts that must be in writing
      i. Contracts for the sale of goods for $500 or more
      ii. Retail installments sales contracts
      iii. Security agreements

   E. Terms of a contract
      i. Parole evidence rule: Evidence of contract terms in the form of conversation between the parties is not allowed to change or contradict a written contract, unless
         a. That evidence is offered to clarify a term that is vague or unclear, or
         b. The evidence is of a modification of the written contract that occurred after the written contract was completed.
         a. Implied terms: In contracts for the sale of goods, there is an implied term (called an implied warranty of merchantability) that the goods will be fit for the ordinary purpose for which they are used, assuming the seller is someone who sells these goods in the ordinary course of business.

   F. Parties to a contract
      1. Husband and wife do not have authority to bind each other to contracts, unless one is acting as an agent for the other. Marriage =agency.
      2. An agent <u>does</u> have authority to enter a contract on behalf of the principal.
      3. Under the theory of joint and several liability, a creditor having a contract with two debtors has the option of suing either or both for the entire amount due.

IV. Actions to recover personal property

A. By a non-secured party: Requires evidence identical to conversion claim, plus evidence that defendant is in possession of property, but remedy is return of personal property, along with cost of repairing damage to property and for loss of use.

B. By a secured party:
   i. SP must prove

      a. Security agreement
         i) Written
         ii) Signed
         iii) Dated
         iv) Contains a description of the property.

      b. Default by defendant

      c. Defendant is in possession of property.

      NOTE: Amount of underlying debt is not relevant.

   ii. Retail Installment Sales Act
      a. Applies to consumer credit purchases in which seller finances purchase
      b. Seller allowed to take security interest only in property sold, or in property previously sold by same seller and not yet paid off.
      c. Attempt to take security interest in other property is void.
      d. FIFO rule applies to allocation of payments when several goods bought from same seller.

V. Summary Ejectment
   A. Procedure
      i. Property manager may sign complaint, but owner must be listed as plaintiff
      ii. Service by posting? No money judgment
      iii. Judgment on the pleadings available if all requirements satisfied

   B. Grounds
      i. Breach of lease condition (forfeiture clause?)
      ii. Failure to pay rent (demand/10-day wait/tender)
      iii. Holding over
         a. Lease ends when it says it ends
         b. Month to month: 7 days
         c. Week to week: 2 days
         d. Year to year: 30 days
         e. Special rule for mobile home lots: 60 days
      iv. Criminal activity

   C. Consumer Protection Laws
      i. Late fees (maximum amount, agreed-to in lease, at least 5 days late)

ii. No self-help eviction
iii. Security deposit
iv. Residential Rental Agreements Act
LL has duty to keep premises in safe and habitable condition and make all repairs

SMALL CLAIMS PROCEDURE: BEFORE TRIAL

IS IT A SMALL CLAIMS ACTION?

What is the principal relief sought? Summary Ejectment
Money Owed
Return of Personal Property

Not Coercive Judgment
Not Action to Recover Real Property

In case of a claim for $$ or personal property, what is amount in controversy? Maximum $5,000

Does at least one Δ reside in your county?

Q: What should the magistrate do if a case does not meet one of these requirements?

A: The magistrate should not hear the case.

	LOCAL PRACTICE ALERT: Ask your clerk whether you should fill out an order dismissing the case with prejudice or simply return the file to the clerk.	

Q: Where does a corporation "reside?"

A: Corporations that have authority to do business in NC reside in either the county in which the principal office is located or the county in which the corporation maintains a place of business. If neither of these applies to a particular corporation, it resides in any county in which it is regularly conducting business.

Q: What if π has sued more than one Δ, but only one Δ resides in the county?

A: The law requires only that "at least one Δ" reside in the county.

HAS THE Δ BEEN SERVED? (PP. 15-20)

Check the file for one of the following: Completed return of service on back of summons
π's affidavit & postal receipt
Δ's written acceptance of service
Δ has filed motion, answer, or counterclaim
OR
Δ is present in court

Q: What should the magistrate do if the summons and complaint have not been served?

A: Continue the case to allow additional time for service. Use AOC Form G-108.

Q: How is service accomplished on a corporate defendant?

A: By delivering a copy to an officer, director, or managing agent, OR
Leaving a copy in the office of one of these people with a person apparently in charge of the office, OR
Mailing a copy to one of these people by certified mail, return receipt requested, OR
Delivering a copy to the registered agent, OR
Delivery by a designated delivery service.

Q: What if π has sued more than one Δ, but only one has been served?

A: π must choose between (1) continuing case to attempt service on other Δs, or (2) taking a voluntary dismissal against unserved Δs and going ahead against Δ that has been served.

Hint: Be careful not to confuse service of process with the rule about at least one Δ residing in the county**.** They are two separate requirements.

TWO THINGS THAT MIGHT HAPPEN BEFORE TRIAL:

1. Δ might file an answer.
2. Either π or Δ might ask for a continuance.

Answer: Δ's response to complaint. Not required, but may be significant in that it substitutes for S/P.

Continuance: request by either party for delayed trial date.

For pre-trial motion for continuance, remember:

The law favors, but does not require, granting a continuance if both parties join in the request.

If a request for a continuance is made by only one party, the law requires that party to demonstrate good cause.

If the magistrate grants a continuance, s/he must be certain that the other party receives notice of the new trial date and time.

	LOCAL PRACTICE ALERT: Be sure to find out what your county's policy is about the procedure for pre-trial requests for a continuance. See Continuance Policy document in Appendix.	

SMALL CLAIMS PROCEDURE: DURING TRIAL

THINGS THAT MAY HAPPEN BEFORE YOU EVEN GET STARTED, AND WHAT TO DO ABOUT THEM

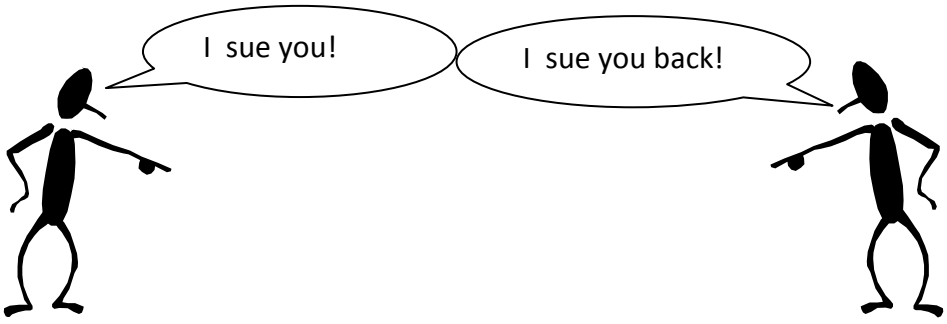
1. Plaintiff does not appear for trial.
   Action: Dismiss case with prejudice for **failure to prosecute**.

> Local Practice Alert: Not all magistrates follow this practice. Some magistrates dismiss with prejudice only if the Δ appears, while others require the Δ to appear AND to request dismissal.

2. Defendant does not appear for trial.
   Action: Administer the oath to plaintiff and any witnesses and hear testimony just as you would if Δ were present. This situation is handled exactly as though Δ were present, but presented no effective defense.

3. Plaintiff requests a **voluntary dismissal**. (Sometimes this happens before trial as well.)
   Action: π can dismiss the case at any point before s/he has finished presented evidence. G-108.

4. Defendant has filed a **counterclaim**.



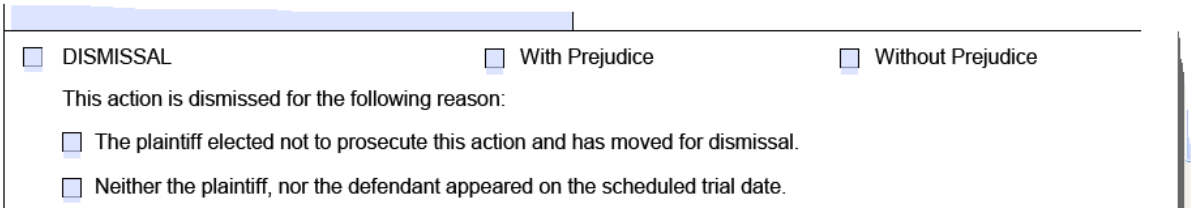
Rules for counterclaims: a. Must not exceed $5,000.
b. Must be in writing.
c. Must be filed with clerk before the time the trial is scheduled to begin.

Action: Assuming **counterclaim meets above conditions**, tell Δ to give π a copy. If π needs time to prepare a defense, grant a continuance.

Action: If counterclaim is **raised after the time case is set for trial,** tell Δ that s/he may file it as a separate action.

Action: If counterclaim is for **more than $5000**:

- Ask Δ if s/he wants to (1) reduce the amount so that the counterclaim can be heard today, or (2) take a voluntary dismissal and refile in district or superior court.
- Be sure to inform Δ that reducing the amount of the counterclaim is binding--Δ can't reduce a $8,000 counterclaim to $5,000 and then bring another action for the $3,000 excess.
- If Δ chooses to reduce claim, write something like the following in the "Other" section of the judgment, under "Findings": "Defendant filed a counterclaim in this action in the amount of $8,000" but amended his complaint to reduce the amount claimed to $5000 this day in open court."
- If Δ chooses to take a voluntary dismissal of her counterclaim, attach G-108 to the judgment, filled out as follows:


☐ DISMISSAL ☐ With Prejudice ☐ Without Prejudice
This action is dismissed for the following reason:
☐ The plaintiff elected not to prosecute this action and has moved for dismissal.
☐ Neither the plaintiff, nor the defendant appeared on the scheduled trial date.

What if π voluntarily dismisses her case after Δ has filed a counterclaim?
Action: Verify that π has received notice of the counterclaim, and then hear the counterclaim just as though it had been filed as a small claims action in the first place.

5. One of the parties requests a **continuance**.
Action: If both parties are present and agree to a continuance, the law favors—but does not compel—allowing it.


Alert: The magistrate should inquire into the reason for the continuance. If the parties are attempting to reach a settlement, a continuance is appropriate. If the case has been continued previously, however, the reason may not be that the parties are actually

attempting to reach a settlement, but rather that the court is being used to supervise an installment payment schedule. Most commentators with expertise in small claims law discourage this practice. Their concern is that it encourages an impression of the court as a collection agency, working to assist the creditor in collecting a debt.

☆ Alert: Be wary of a π who appears in court seeking a continuance based on a contention that the absent Δ has agreed to it. In this situation, the best practice is to inquire further into the communication between the parties before court. Remember that it is the court – not the π -- who determines whether a continuance shall be granted. Plaintiffs who tell Δs before trial that they need not appear "because I'm going to get it continued" should be emphatically informed that this practice is inappropriate.

When one party's request for a continuance is opposed by the other party:
Action: Party seeking continuance must show good cause and, if it is the Δ, must also claim to have a "meritorious defense."
What is **good cause**? "In passing on the motion, the trial court must pass on the grounds urged in support of it, and also on the question whether the moving party has acted with diligence and good faith. . . . The chief consideration to be weight in passing on [the request] is whether the grant or denial of a continuance will be in furtherance of substantial justice." Shankle v. Shankle, 289 N.C. 473 (1976).

Examples of Good Cause
- ☞ Illness or other emergency
- ☞ Surprise at trial (amended complaint or counterclaim)
- ☞ Attorney unavailable b/c required to appear in other court
- ☞ Good reason to believe settlement likely (consider very short continuance)

Borderline
- ☞ Party unprepared for trial because of ignorance of law. Ex: missing witness, missing documents.
- ☞ Party wants to hire lawyer.
- ☞ Repeat-Plaintiff surprised by variation among magistrates.

☆ ALERT: New legislation enacted in 2009 (and thus not included in Brannon's Small Claims Law) *requires* the magistrate to grant a continuance in all small claims cases, *other than summary ejectment cases*, in which the Δ was served less than five days before the trial. Applying Rule 6's requirements for calculating time, the result is that a case in which service is accomplished on Monday may be heard no sooner than the following Monday (service on Tuesday, trial no sooner than following Tuesday, etc.). *See* Small Claims Reference for a memo discussing this and other new legislation.

Service of Civil Process: 2009 Legislation

The 2009 General Assembly enacted into law two bills governing service of process in small claims cases, each of them in apparent response to the fact that defendants in these cases sometimes have little time to prepare for trial.

Service of Process in Summary Ejectment Actions

The first new law, SL 2009-246, amends GS 42-29, governing service of summons in summary ejectment actions. As many of you know, small claims procedure in these cases is geared toward minimizing the time a landlord must wait for trial on the landlord's claim for possession of rental property. Existing law requires a law enforcement officer who receives a summons for service to mail a copy of the summons and complaint to the tenant "no later than the end of the next business day or as soon as practicable." GS 42-29 goes on to state that the office may attempt to telephone the defendant within five days after summons is issued, to arrange for service. In cases in which tenants are not served in this manner, the law requires the officer—before the end of this five-day period-- to go to the defendant's home to attempt service. S.L. 2009-246 adds to this provision a requirement that the officer's visit occur at least two days prior to trial (excluding legal holidays). If service is not accomplished at the time the officer visits, existing law directs the officer to "affix copies to some conspicuous part of the premises claimed" (service by posting).

This law imposes a requirement on law enforcement officers charged with serving civil process, rather than on magistrates who hear small claims cases. Further, the new law does not address the consequences of non-compliance. As a result, questions have arisen about what *a magistrate* should do when a summary ejectment action appears on the small claims docket and the defendant was served less than two days before trial. The question may come up in any of several contexts. First, the magistrate may call the case and learn that both parties are present in court. Because the General Assembly's intention was to provide tenants with additional time to prepare for trial, it is clear that the magistrate must grant the defendant's request for a continuance, for at least as long as necessary to allow for two days notice. The law provides that in calculating time periods, the first day is not to be counted. Accordingly, if the defendant is served on Monday, the magistrate must grant a defendant's request for a continuance if the trial is held on Tuesday. The case may be heard, however, on Wednesday (two days after service), and a magistrate may choose to grant an even longer continuance if that seems appropriate.

A second question arises on these facts if the tenant does not request a continuance (which is likely to happen in cases in which the tenant is unaware of the new two-day rule). The answer to this question is not specified in the statute. In light of clearly expressed legislative intent, however, the magistrate should, at a minimum, inform the defendant that she or he is entitled to two days notice before being forced to appear in court and defend against the lawsuit. If the tenant expresses a clear affirmative desire to proceed with the hearing, a magistrate may consider that as a valid waiver of the tenant's rights and hear the case that day. In the absence of a knowing waiver, however, I do not believe the magistrate should hear the case, given clear legislative intent to the contrary. If a magistrate hears the case that day after finding waiver by the defendant, the best practice would be to note the waiver in the judgment. By doing this, the magistrate will preserve for the record the fact that the tenant's right to minimum notice was observed.

The next question arises when the plaintiff is present in court, but the defendant is not. If service was made sooner than two days prior to trial, my opinion is that the magistrate should continue

the case on the magistrate's own motion. Given that the purpose of the amendment is to allow adequate time for a defendant to receive notice of an upcoming trial, it is of particular concern that the defendant may not appear for trial *because* of inadequate notice. This is particularly true in cases in which service is accomplished in some substituted manner, such as by handing a copy to defendant's spouse or by posting. In these cases, there is a real possibility that defendant may be completely unaware that a trial is scheduled. Even when service is made directly on defendant, however, the notice may have been inadequate to permit the defendant to arrange to attend court the next morning. Magistrates may want to confer with their clerks about the mechanism for notifying both the clerk's office and the parties when a case is continued for this reason.

A harder question arises when neither party appears for trial. In the typical case, of course, a magistrate dismisses the plaintiff's lawsuit with prejudice for failure to prosecute. But what if the plaintiff has called to inquire about service and has been informed that service was accomplished later than was required by law? A plaintiff might decide that an appearance is unnecessary because the trial is certain to be postponed. One might argue that in this situation the plaintiff had no intention of "failing to prosecute." On the other hand, the justice system has long taken the position that when a case is scheduled for trial, a plaintiff must either appear for trial or seek a continuance. A plaintiff who does neither has no legal right to object if the case is dismissed. (And if a defendant does appear and waives the right to a continuance, a magistrate should strongly consider dismissing the action with prejudice, given the effort the defendant has made to comply with the demands of the summons.) Absent legislative or appellate court guidance, a magistrate is left to consult with colleagues and perhaps the chief district court judge about how such cases should be handled.

Service of Process in Non-Summary Ejectment Small Claims Cases

The second legislative amendment related to service of process in small claims cases also raises questions. S.L. 2009-629 amends GS 7A-214, the statue governing the time within which a small claims action must be heard. That statute provides that small claims actions are to be scheduled for trial no later than 30 days after the complaint is filed. The new law inserts a sentence stating that the magistrate "shall order a continuance" in small claims actions other than summary ejectment actions when service is accomplished less than five days before trial. GS 7A-214 goes on to say that the time set for trial may be changed if all parties agree. The statute concludes with the familiar sentence authorizing a magistrate to grant continuances "for good cause shown."

Again, legislative concern that defendants have adequate time in which to prepare for trial is apparent in this amendment. The law prior to amendment allowed a defendant to be served on Monday afternoon and the trial to be held at 9:00 AM on Tuesday. In this situation, the defendant was left to hope that the plaintiff would agree to a continuance or, failing that, that the magistrate might find such short notice "good cause" for a continuance. In fact, many magistrates might have reasoned that no good cause existed as a matter of law, given that all statutory time limits and procedural rules had been observed. With this background, the General Assembly's desire to guarantee defendants at least five days notice is certainly understandable. The new time limit is consistent with the existing rule applicable to motions filed in district and superior court: GS 1A-1, Rule 6(d) requires that in all such motions, the other party must be given at least 5 days notice before the matter is heard.

The questions that arise with this law relate to the mandatory aspect of the statutory language. When both parties appear for trial and the defendant seeks a continuance, the way is clear: a magistrate is required to grant a continuance. The same is true if the plaintiff appears and the defendant does not; again, the defendant's very absence tends to support the concern that she or he may not have received adequate notice that a trial date was looming. The mandatory language of the statute makes clear that the defendant is not required to ask for a continuance—the "default setting," so to speak, is a continuance whenever the defendant has not received the required notice. The statute does not

indicate how long the continuance should be, but the underlying legislative intent suggests that the continuance should be long enough to allow the defendant at least five days to prepare for trial.

As we discussed in reference to the new law applicable to summary ejectment actions, a more challenging legal question is presented by the situation in which the defendant appears and asks to waive his or her statutory right to a continuance. It is common for parties to a lawsuit to waive various rights in the course of trial, and there is generally no obstacle to them doing so, provided that the waiver is made knowingly. It is easy to imagine that many defendants, aware that they have no defense to the plaintiff's claims, might wish to dispose of the case quickly, rather than be forced to travel twice to the courthouse. Indeed, it is difficult to imagine a good reason for denying defendants the right to make this choice. This question is made difficult only by the mandatory language of the statute: "the magistrate shall order a continuance." When one considers the absurdity of ordering a continuance in the face of objections from--and to the detriment of--both parties, however, it seems reasonable to read this language as requiring a continuance unless waived by the defendant. The same reasoning arguably applies to the situation in which the plaintiff fails to appear and the defendant appears. Because the right to a continuance—and the ability to waive that right—belongs to the defendant, it seems entirely justified to expect plaintiffs to either attend court or risk losing their case in the event the defendant appears and waives continuance.

Once again, the most perplexing aspect of the new law is presented when neither party appears. Should the magistrate dismiss the action with prejudice based on plaintiff's failure to prosecute? On the one hand, it makes little sense to continue a case out of concern for a defendant having adequate time to prepare when the result without the protective amendment would be to dismiss the action entirely—a result likely to be welcomed even more enthusiastically by defendants. On the other hand, the statutory language is mandatory, and the defendant is not present to make a knowing waiver of his or her right to a continuance. It seems likely that different counties—and different magistrates—will adopt different policies about the proper way to handle this situation. Whatever the policy, though, it should be one that is applied consistently, so that all parties are able to make decisions about their actions based on legal consequences that are predictable.

Counting time

A final issue raised by both new laws concerns calculating time. GS 1A-1, Rule 6, sets out the general rule for calculating time in civil matters. That provision states that the first day of the time period is not included, and the last day is included (unless it is a Saturday, Sunday, or legal holiday, in which case the time period runs over to the next day when the courthouse is open and doing business). **In cases in which the time period is less than seven days,** however, Saturdays, Sundays, and legal holidays are not included. The result is that small claims actions, other than those for summary ejectment, may be heard no earlier than one week after service of process (i.e., if service is accomplished on Monday, the case may be heard no sooner than the following Monday). The new law applicable to summary ejectment actions specifically requires that service be accomplished "at least two days prior to the day the defendant is required to appear to answer the complaint, excluding legal holidays." Previous versions of the bill had excluded "weekends and legal holidays", but the reference to "weekends" was deleted from the final bill. The result is an exception to the general rule set out in GS 1A-1, Rule 6, with weekend days counted toward satisfaction of the two-day requirement. Consequently, service on Friday would allow a case to be heard on Monday, since Monday is the third day following service.

Lewandowski/SOG/2009

Caveat and Summary

As we have seen, the proper application of these two amendments is unclear in some situations and likely to remain so until further guidance is provided by the General Assembly and/or the appellate courts. This memo has attempted to set out a rationale in support of one possible resolution of these issues, but whether the appellate courts will answer the questions addressed in the manner as the author necessarily remains uncertain. For purposes of clarity and ease of reference, the author's recommendations are summarized below, but magistrates are as always reminded that the suggestions herein are just that—suggestions—and should not be regarded as dispositive of the questions addressed.

Obviously, the language of the two amendments is not identical, and thus the legal issues presented are somewhat different. Nevertheless, the author's suggestions about how to dispose of cases in which inadequate notice is present are the same, and are as follows:
If both parties appear, the magistrate should continue the case unless the defendant makes a knowing waiver.
If only the plaintiff appears, the magistrate should continue the case.
If only the defendant appears, the magistrate should continue the case unless the defendant makes a knowing waiver. If the defendant waives the right to a continuance, the case should be dismissed for failure to prosecute.
If neither party appears, the author makes no recommendation other than to suggest that the magistrates in each county discuss the question and adopt a consistent policy for responding to these cases.

If you have questions or concerns or would like to discuss the contents of this memo further, please don't hesitate to call or email me:
Dona Lewandowski
(919)966-7288
lewandowski@sog.unc.edu

Lewandowski/SOG/2009

You Ain't the Boss of Me!

The (Lack of) Authority of a Small Claims Magistrate to Order a Person to Perform an Act

During the last few weeks, several magistrates have called with questions about widely-varying fact situations that have one thing in common: in each case, the plaintiff wants a court order directing someone to do something. This request is a trap for the unwary magistrate, who may almost immediately be faced with what to do when the order is defied. Imagine, for example, that you direct the tenant in a summary ejectment action to clean the apartment and hand in the keys. The tenant does move out, but he takes the key with him, and leaves the apartment filthy. The landlord asks you what happens now. The fact that you have no satisfactory answer for him reflects one of the reasons you should not award such a remedy. The most significant reason, though, is that you have no legal authority to do so.

At common law, courts were frequently called upon to issue what is sometimes called a *coercive order*: an order directing a party to follow the court's direction or else face the contempt power of the court. District and superior court judges today frequently issue such orders. Whether it is ordering a company to reinstate an employee, a doctor to remove a feeding tube, or a nightclub to turn down the music after midnight, the availability of this remedy is well-established. In the case of actions based on contract, the law even has a special name for the remedy: a party who wishes to force the defendant to carry out her obligations under a contract is said to be seeking an order of "specific performance." Defendants who defy a coercive order may be imprisoned until they comply, under the civil contempt power of the court, or fined and imprisoned as punishment for defying an order of the court, under the criminal contempt power of the court. *See* G.S. Ch. 5A.

The statutes that identify the cases a small claims magistrate is authorized to hear are G.S. 7A-210 and G.S. 7A-211.1. It is interesting to note that the former identifies those cases in terms of the remedy the plaintiff is seeking: A small claims action is an action in which "[t]he only principal relief prayed is monetary, or the recovery of specific personal property, or summary ejectment, or any combination of the foregoing. . . ." G.S. 7A-211.1 authorizes magistrates to hear actions "to enforce motor vehicle mechanic and storage liens." Conspicuously absent from this list are the remedies of specific performance and injunctive relief —orders directing a party to perform, or cease to perform, a particular act.

In some ways, this list of available remedies is very broad indeed. The statute allows a magistrate to hear any civil action in which the plaintiff is seeking monetary damages, so long as the amount is $5000 or less. Theoretically, you may hear cases involving unfair trade practices, medical malpractice, slander, breach of warranty, false imprisonment, complex commercial contract cases—the type of case is not limited, so long as it falls within the allowable monetary limit. The result is that magistrates often hear cases involving an extremely wide range of challenging legal concepts as well as complex fact situations (thus, the name of this publication: *Big Law*). Similarly, a magistrate may hear any case for summary ejectment -- even if the underlying contract is a commercial lease involving millions of dollars -- so long as the remedy sought is possession only (or damages within the $5,000 limit).

I imagine some of you are thinking, "Wait a minute. When we hear some of these cases, we ARE ordering someone to do something. We're ordering the tenant to move out, or the defendant to hand over personal property, or DMV to transfer title." Certainly, the effect of your judgment is often to force a party to do something he'd rather not do. But if you look closely at the language of the judgment you enter, you'll notice that it does not contain such mandatory language. It doesn't say "Defendant, you must pay plaintiff $5,000," or "Defendant, you must give plaintiff the washing machine." There is instead a small, but extremely significant, difference, at least from a legal point of view. The judgment says instead something like, "It is ordered that the plaintiff recover possession," or "It is ordered that the plaintiff recover the following principal sum," or "that the defendant be removed from and the plaintiff be put in possession of the premises at. . . ." Orders containing language such as this require additional proceedings before the defendant is forced to comply. As you know, the usual process is that a clerk issues a writ (either of execution or of possession) based upon the judgment, and that writ actually directs not the defendant, *but the sheriff*, to take certain steps.

Contrast this situation with an order issued by a judge ordering a defendant to sign a particular document. In this case, no writs issue, and no sheriff is involved in implementing the court's order. Instead, a defendant who fails to comply will be ordered to appear and show cause why he or she should not be held in contempt. As you know, a magistrate has no such contempt power, aside from the power to punish direct criminal contempt committed while the court is sitting for business.

This distinction is a relatively subtle one, and it is not surprising that plaintiffs don't always observe it in deciding what remedy to request in a small claims action. One area in which the issue often arises involves motor vehicle sales. Let's look at some examples:

> Example 1: Billie and Sam agree that Billie will buy an old Mazda from Sam, paying $200/month until the total purchase price of $1800 has been paid. After Billie pays the full amount, Sam refuses to hand over the title. Can Billie obtain a judgment in small claims court ordering Sam to hand over the title? Can Billie obtain a judgment in small claims court ordering DMV to transfer title to Billie? The answer is no. While Billie may be able to obtain an order in district court requiring Sam to perform his part of the contract, that remedy is not one that a small claims judge is authorized to grant.
>
> Example 2: First National Bank brings an action against Danny Debtor seeking a money judgment in the amount of $2,000. After proving that Danny owes the money, First National asks that you enter an order authorizing the bank to seize funds in Danny's savings account to satisfy the judgment. Do you have authority to do so? Again, the answer is no. While First National may actually have the right to seize the funds pursuant to its contractual agreement with Danny, a small claims magistrate has no authority to order such seizure. At first glance, this remedy may not appear to be a coercive order—after all, you're not ORDERING First National to seize the funds. By authorizing the seizure, however, you are effectively forcing Danny to satisfy the judgment without the protections offered by the usual procedure First National must use to enforce a judgment.
>
> Example 3: Larry Landowner brings an action for money owed based on the presence of Ernie Encroacher's livestock on his property. Larry contends that Ernie continues to allow two cows and a horse to roam and graze on his property, even after Larry informed Ernie that the animals were wandering on to his land. Larry asks that you

award him $5000 as rent for Ernie's use of the property and order Ernie to remove the animals. Can you order Ernie to do so? No. Again, you have no authority to enter a coercive order requiring Ernie to remove his livestock. Larry must seek this remedy in district or superior court. [1]

What should you do when you are confronted with a case in which the plaintiff is seeking a coercive order? It is entirely appropriate in this situation to provide the plaintiff not with advice, but rather with information. Explain to the plaintiff that while he or she may be entitled to the requested relief, it is not available in small claims court. If a coercive order is a relatively minor aspect of what the plaintiff wants, the plaintiff may agree to drop that request and proceed with the remainder of the lawsuit. If, on the other hand, what plaintiff really wants is to put an end, once and for all, to Ernie's continual, bothersome trespassing animals for example, it makes more sense for the plaintiff to take a voluntary dismissal without prejudice and re-file his action in a court authorized to grant the relief he wants.

One of the most complex situations in which a request for a coercive order may arise is an action arising out of a dispute involving earnest money. In the next issue of *Big Law,* we'll take a look at some of the legal issues that may come up in those cases. If you have questions about earnest money, or have examples of cases you'd like to share, be sure to drop me a line at lewandowski@sog.unc.edu.

[1] Just for curiosity's sake, what about Larry's claim for back rent? Assuming, as the facts indicate, that there was never any sort of rental agreement between Larry and Ernie, there is no legal basis for Larry to collect rent. Larry's claim is actually a misnamed effort to collect damages for a tort—a civil wrong—called "trespass to property." The law provides that Larry is entitled to nominal damages—say, $1—if Ernie knowingly allows his animals to trespass on Larry's land. In addition, Larry is entitled to any actual damages caused by the trespass. For example, if the animals consume most of Larry's sunflower crop, he would be entitled to recover lost profits as well.

CHECKLIST FOR CONTRACT CASES IN SMALL CLAIMS COURT

DOES THIS CASE INVOLVE AN AGREEMENT BETWEEN π AND Δ?

WHO ARE THE PARTIES TO THE CONTRACT?

If parties are not identical to people who entered into contract, why not?

- Agency
- Guarantors
- Joint and Several Liability
- Husbands, Wives, and Kids

WHAT ARE THE TERMS OF THE AGREEMENT?

If the agreement is in writing, ask for a copy. Read it carefully. Are the terms clear?

If the agreement is not in writing, listen to the testimony about the terms.

- ☐ Do the parties agree about the terms of their agreement?
- ☐ If they don't agree, what specifically do they disagree about? What does π contend? What does Δ contend? In the case of a disagreement, the magistrate must determine the terms, remembering that the party seeking to enforce the contract has the B/P on its terms.
- ☐ Are there terms they left out? Assuming the intent to contract is clear, the magistrate "fills in the blanks" based on evidence about what is usual and reasonable, to implement the probable intention of the parties.

What rules of evidence should the magistrate be mindful of in determining the terms?

- ☐ If a contract is written, the *best evidence* of what the parties agreed to is the written contract.
- ☐ If a contract is written, evidence about what the parties said before signing the contract is not relevant unless meaning is unclear (parol *evidence rule).*
- ☐ In an action on an account, a *verified itemized statement of the account* is sufficient to prove that Δ owes that amount of money in the absence of evidence to the contrary.

Are there additional or different terms written into the agreement by the law?

- ☐ *In contracts for the sale of goods*, is π's claim for breach of warranty?
- ☐ *In actions based on a lease,* does the landlord have additional responsibilities under the RRAA?
- ☐ *In actions involving consumer credit sales,* does the Retail Installment Sales Act affect any of the contract terms?

Before moving to the next question, stop and decide what the terms of the agreement are.

Is the agreement one that the law will enforce?

- ☐ Does it involve a bargained-for exchange?
- ☐ Is this particular defendant (rather than someone else) bound by the contract?
  - --Does the contract involve a corporation?
  - --Does the contract involve an agency relationship?
- ☐ Is there any question about Δ's ability to consent?
  - --Was Δ a minor at the time of the contract?
  - -- Is there doubt about Δ's competence to contract?
- ☐ Is there a legal rule that renders this agreement unenforceable?
  - --Is this one of the kinds of contracts the law requires to be written?
  - --Did π wait too long to file the lawsuit?
  - --Are the terms of the agreement so one-sided and unfair as to be *unconscionable*?

DID Δ BREACH THE CONTRACT?

WHAT DAMAGES IS π ENTITLED TO?

Common damage items:

- ☐ Direct damages (difference between value of promised performance and what it will cost now)
- ☐ Incidental damages (costs of preparing to perform, those incurred in response to breach, those involved in minimizing injury)
- ☐ Consequential damages (foreseeable damages resulting from breach)
- ☐ Interest from date of breach

Special cases:

- ☐ Cancelling the contract: damages for putting everything back the way it was
- ☐ Liquidated damages clauses
- ☐ Failure to return property: FMV of property
- ☐ Breach of warranty: difference between FMV of goods as warranted and FMV of goods received
- ☐ Checks NSF: Amount of check + bank charge + processing fee + amount of check x 3 ($100-$500)
- ☐ Attorney fees

Be on the lookout for:

- ☐ Duty to mitigate damages
- ☐ Joint & several liability

Big Law: Basic Bits of Bankruptcy

Welcome to the first post on the SOG's new listserv for magistrates holding small claims court. The most difficult decision so far has been what to call our new listserv. I considered Gavel-Banging Law, but I'm not certain that captures the solemnity and significance of your job. I've finally settled on Big Law. The title is recognition of the fact that, while the monetary amounts at issue in small claims cases are often small, the law itself is not correspondingly simple.

The listserv is set up as a one-way communication, meaning that I'm the only person who can post, and online discussion or comment is not available. That certainly doesn't mean I don't want to hear from you—quite the contrary! My hope is that you'll feel free to call or email about individual posts and to suggest topics for future posts. Please don't hesitate to print out a post for other magistrates if you think that might be helpful, and to share posts with attorneys, clerks, judges, or others who might be interested in the subject matter.

One of the purposes of the listserv is to respond to common questions in a way that's more accessible to all, so your questions about small claims law and practice are likely to benefit magistrates other than yourself. Whenever I draw on a particular question or fact situation, I promise not to include information that might be used to identify the questioner or the county from which the question originated. In choosing topics to address, I'm looking for those of general interest to small claims magistrates across the State, so I'm going to resist the temptation to share those uniquely weird situations that are unlikely to reoccur. --Well, I may yield to temptation every now and then. After all, having good stories to tell is one of the good things about being a small claims judge.

As many of you know from dealing with federal housing law, things can get especially complicated when federal law intersects with state law. Because bankruptcy law is an extremely complex subject, when I get a question involving that subject the image that comes to mind is the scene from the old movies when the hero shoves a cross in the face of Dracula: "Back! Back, you monster!" But the truth is the portion of bankruptcy law relevant to small claims is not complex at all.

In this first post to the Big Law Listserv, I want to take a look at six frequently asked questions and their answers. If you have follow-up questions, concerns, or comments, send them to me. I'll do another post next week addressing the issues you raise, as well as sharing one interesting telephone call I received recently on the subject.

Here are six Basic Bits for your small claims tool kit:

Basic Bit #1: *What to do when you hear that the defendant may have filed for bankruptcy.*

Bankruptcy is significant in small claims court for one reason only-- the automatic stay provision. This federal law forbids creditors from trying to collect debts from the debtor, whether by calls and letters demanding payment, by filing or persisting in a legal action on the debt, or by seeking to enforce a judgment obtained before the stay went into effect. The stay also

applies to secured parties attempting to repossess or sell secured property. A creditor who violates the automatic stay provision may be subject to civil damages, sometimes including attorney fees and punitive damages. The "automatic" part of an automatic stay means that the debtor is entitled to the stay even if it went into effect several hours ago and creditors have not yet received formal notification. A judgment entered by a magistrate in small claims court in violation of the automatic stay provision is void, and a magistrate who knowingly enters judgment when a stay is in effect violates federal law. So, when you hear the word "bankruptcy," the first thing you should do is STOP, and find out some details.
The most important detail is whether the debtor has actually **filed a petition** for bankruptcy. Sometimes a defendant may indicate that he plans to file for bankruptcy. In one case, a defendant presented a letter from his lawyer stating that the attorney represented him in his "bankruptcy case." Closer questioning revealed that the debtor had not yet actually filed a petition. The automatic stay provision is triggered when a petition is filed, so be alert to this particular detail.

Basic Bit #2: *What does the debtor have to do to prove that she is entitled to the stay?*
Nothing. Because the stay is automatic when a petition for bankruptcy is filed, its protections are in force even if the debtor is not prepared to prove that she has actually filed for bankruptcy. The stay clicks into place the moment the petition is filed. A magistrate with reason to suspect that the defendant may have filed for bankruptcy has a couple of options. If the magistrate has doubts about whether the defendant has actually filed for bankruptcy, the magistrate can determine the facts by consulting the appropriate bankruptcy court. (Details about how to accomplish this will be provided in the next post.) Another option is to continue the case to allow time for the parties to gather documentation for their claims—whether a claim by the plaintiff that the debtor has not actually filed for bankruptcy, or a claim by the defendant that she has.

Basic Bit #3: *If the magistrate has reason to believe that the debtor has filed for bankruptcy, what does the magistrate do with the case?*
The magistrate should use AOC G-108, checking the block near the bottom of the page labeled "BANKRUPTCY." This places the case on inactive status, so that a creditor may reinstate his claim in the future (assuming it is not resolved in the bankruptcy proceeding) without paying another filing fee or risking dismissal due to the statute of limitation. A magistrate should not dismiss a case because of the automatic stay provision.

Basic Bit #4: *If the stay begins when a bankruptcy petition is filed, when does it end?* The purpose of the automatic stay provision is not to forever bar a creditor from securing payment of a debt, but is instead to allow time for a bankruptcy trustee to develop some sort of payment plan that treats all creditors fairly. In what is known as Chapter 7 bankruptcy, the trustee identifies and collects all qualifying property belonging to the debtor and invites creditors with outstanding claims against the debtor to make their claims known. The trustee will sell the qualifying property and distribute the proceeds among the creditors. The debtor is then "discharged" from any further liability on pre-bankruptcy debts. At this point, the stay no longer applies (although the debtor will almost certainly have a compelling defense in that the debt has been discharged in bankruptcy). Other reasons a stay might terminate arise when a case is closed or dismissed. A bankruptcy case is closed when a payment plan has been developed and the debtor has complied

with the plan. A case is dismissed when the bankruptcy court finds that the debtor is for some reason not entitled to pursue the claim.

EXAMPLE: Creditor filed an action against Debtor in small claims court seeking to repossess a washer-dryer set. As soon as he is served, Debtor files for Ch. 7 bankruptcy, triggering the automatic stay provision. The small claims judge correctly uses G-108 to place the case on inactive status, pending resolution of the Ch. 7 case. The bankruptcy court dismisses the case based on a provision in the Bankruptcy Code allowing dismissal if (1) the debtor is an individual; (2) the debts are primarily consumer debts; and (3) granting relief would be a substantial abuse of the bankruptcy law. (For example, the debtor has a history of running up consumer debt and then seeking discharge in bankruptcy court.) The plaintiff/creditor returns to small claims court with a copy of the dismissal. The clerk of court now has authority to re-calendar the case for hearing in small claims court.

Basic Bit #5: *What should I do if I entered judgment before I learned that an automatic stay was in place?*
The best course of action is to confer with your supervisor about how to proceed. Because you had no authority to enter judgment in violation of the automatic stay, your judgment is void. A magistrate does not have the power to set aside a void judgment, but a district court judge does. Neither a plaintiff nor a defendant benefits from having a void judgment on the record—the defendant for obvious reasons, and the plaintiff because any attempt to enforce the judgment would subject him to potential liability at the hands of the bankruptcy court. Ideally, one of the parties will file a motion asking a district court judge to declare the small claims judgment void, but in the absence of a motion by one of the parties, the district court may proceed on its own motion.

Basic Bit #6: *Does the automatic stay apply to actions by a landlord to recover possession of rental property?*
Yes. A leasehold interest in property is a thing of value in the eyes of the law, and an effort to take it from a debtor violates the stay provision. Landlords faced with the prospect of tenants living rent-free for an indefinite period are not without recourse, however. Bankruptcy law provides landlords with a procedure for seeking modification of the stay to allow collection of rent, and sometimes to regain possession of the rental property. Recent changes in federal law have complicated the determination of whether a stay is in effect as far as a summary ejectment action is concerned, but in every small claims case the magistrate should assume the stay applies unless the plaintiff is able to furnish documentation from the bankruptcy court that it does not.

Summing it up:
--If you hear the word bankruptcy mentioned in connection with a small claims case, STOP and inquire whether the debtor has actually filed a petition for bankruptcy.
--Remember that the debtor is not required to prove that a petition has been filed.
--Use AOC-G-108 to place a pending case on inactive status while the stay is in place.
--Read carefully orders from the bankruptcy court to determine whether the stay remains in place, has been modified, or has ended.
--If you enter judgment and discover later that the automatic stay was in place, confer with your supervisor about how to proceed.

--Remember that the automatic stay applies to actions to recover possession, both of personal property and of rental property.

Next post:
--How to tell whether a defendant has filed a petition for bankruptcy;
--A small serving of information about exceptions to the automatic stay provision;
--An interesting case example.
--Your questions, answered.

Bankruptcy and Small Claims Court, Part 2

HOW CAN I BE SURE? As mentioned in Part 1, the automatic stay is activated when a person actually files a petition for bankruptcy. Sometimes you may not be sure whether a defendant is exploring the possibility of filing for bankruptcy, or has gone so far as to file a petition. That information is available by calling VCIS (Voice Case Information Systems. That number for the North Carolina Eastern District is 866-222-8029, option 12. The number for the Middle District is 910-333-5532. For the Western District, the number is 800- 884-9868. There is no charge for this service. When I gave it a try, I found it to be fast and simple.

WHAT'S A RESIDENTIAL LANDLORD TO DO? There are times when a landlord is simply stunned to learn that the small claims judge is unable to proceed simply because a tenant has filed a petition for bankruptcy. When they ask, you can tell them, "No, this does NOT mean that he gets to live there forever rent-free." The law provides landlords with a way to regain possession of rental property if the tenant does not pay rent. That's the good news. The bad news is (1) the landlord has to seek this relief directly from the bankruptcy court, (2) most landlords are able to effectively access this relief only by hiring an attorney, and (3) there is a $150 filing fee associated with the motion for modification of a stay.

I contacted the Bankruptcy Court for the Eastern District and asked the clerk what magistrates should say when landlords ask what they should do next. I thought maybe the Court might have some simple procedure (similar to small claims court) that would allow landlords to act for themselves, rather than having to hire an attorney. If not that, I thought there might at least be a brochure answering common questions that magistrates could provide to landlords in this situation. At least for the Eastern District Bankruptcy Court, that is not the case.

According to the clerk, landlords represented by counsel are usually successful in obtaining relief from the Court, but few unrepresented parties are capable of correctly following the required procedure. Also, the purpose of the law allowing a stay to be modified upon request by a landlord is NOT to allow landlords—in preference to other creditors—to obtain a judgment for back rent. Typically, in residential lease cases, the Court orders that tenants make current rent payments as those come due, or else face eviction. Consequently, when that landlord next appears in front of you, it is usually in the context of his effort to secure possession of rental property.

ROUND TWO. Quite often a landlord will reappear in small claims court, once again seeking possession of residential rental property. The question for the magistrate at that point is whether the court has regained jurisdiction to act. If the landlord shows you an order from the Bankruptcy Court dismissing the case, that determination is fairly straightforward. When the order does not dismiss the case, but instead modifies the automatic stay provisions, the small claims court's authority to proceed may not be quite so clear.

The magistrate must closely examine the language of the federal court's order to identify precisely what conditions must be present in order for the small claims judge to act. A typical order might direct that a tenant/debtor make regular rent payments as they come due, and provide that if a tenant defaults, the automatic stay is lifted as to an action to recover possession of the property. The first question a

magistrate must answer in this case is whether the tenant has defaulted in making rent payments. If so, the automatic stay is modified to allow one narrow exception: the small claims judge has authority to hear and decide an action in which the landlord seeks possession of rental property. The magistrate would thus hear the case just as any other action for summary ejectment. A magistrate would not, however, have authority to make any sort of monetary award in this situation.

WHAT WOULD *YOU* DO? (With thanks to the magistrate who sent in this question.) Company A opens an account with Pop's Building Supply, owned by Pop, and they do business for many years. Pop retires and Pop's son begins to run the business. Son believes in The Modern Way of Doing Business and incorporates the business under the name of Pop's Building Supply, Inc. The account that was originally established with the old man continues on without change, just as it has for many years. Unfortunately, the business under Son doesn't do well, and Pop's Inc. files for bankruptcy, owing a large debt to Company A. Company A brings an action for money owed against Pop's, Inc., which immediately produces its petition for bankruptcy, date-stamped yesterday. Company A says "We don't know nothing 'bout no corporation. Our contract was with Pop, and HE hasn't filed for bankruptcy." How do you rule? *See the answer below, following a brief intermission for a discussion of a completely unrelated matter.*

COMPLETELY UNRELATED MATTER: Can a magistrate perform a wedding in a county other than the one in which s/he serves? Yes. In fact, it is entirely appropriate for the license to be obtained in County A, the magistrate to work in County B, and the wedding to be performed in County C. A magistrate has legal authority to perform a wedding anywhere in the State of North Carolina. In the situation above, the license would be returned to the Register of Deeds in County A, and the fee returned to the Clerk's office in County B.

BACK TO THE CASE OF COMPANY A vs. POP'S, INC. You should refuse to hear the case based on the automatic stay provision of the Bankruptcy Code, using AOC Form G-108. The only issue before you is whether the plaintiff can proceed against this defendant, and this defendant has filed for bankruptcy. The question of whether Company A sued the right defendant is an interesting—but irrelevant—question. Company A sued Pop's Inc, and Pop's Inc. has filed for bankruptcy.
But what about that interesting question? What happens if Company A takes a dismissal against Pop's Inc., and files against Pop and Son individually. No bankruptcy problem here. Does the plaintiff win? Probably not. These facts indicate that Pop entered into an agreement with Company A to engage in a series of contracts on the following terms: Pop orders material, Company A delivers, Pop pays over time, rather than immediately. When Son placed his first order, both parties believed and behaved as though the terms of the contract remained the same, but Son had stepped into Pop's place as the contracting party. When Son incorporated, the same rationale applied to Pop's, Inc.—a contract came into existence, with terms unchanged from the original. The result is that Company A had contracts with Pop, Son, and Pop's Inc., all with the same terms. The specific evidence presented might change your opinion, but it seems extremely unlikely that either party understood that Pop would remain personally liable for debts incurred after he retired. It is also unlikely that Son formed a corporation, but wished to remain personally liable for the debts to Company A. Most likely, one of his reasons for incorporating was to avoid exposure to personal liability for business debts. Just because Pop's Inc. has declared bankruptcy doesn't mean that Company A can hold other persons responsible for performing a contract neither of them entered into. (Earlier contracts, yes, but not this one.) What if Company A came forward with a signed document in which Pop agreed to personally guarantee the debts of the corporation? That evidence, of course, would make a big difference in your decision.

Just another example of Big Law!

WHAT HAPPENS AFTER SMALL CLAIMS COURT

Location of Clerk's Office: _____

Notice to Both Parties

If you are either the plaintiff (the person suing) or defendant (the person being sued) and are unhappy with the decision of the magistrate, you may appeal the case to district court. You may appeal either by telling the magistrate at the trial that you want to appeal or by filing a written request with the clerk of court within 10 days after the magistrate ruled in your case. If you want to file a written request, ask the clerk to give you a copy of form AOC-CVM-303, which is the notice of appeal form. If you give written notice of appeal to the clerk, you must also send a copy of the form to the opposing parties in your case.

Whether you appeal in open court or file a written appeal, you MUST PAY $96 appeal court costs to the clerk within 20 days after the magistrate ruled. If you cannot pay the appeal costs, you may be able to qualify to file your appeal as an indigent. If you are a tenant appealing an eviction and you want to continue to live at the premises until the case is heard on appeal, you will be required to pay past due rent to the clerk and to sign an undertaking that you will pay rent into the court as it becomes due to keep the judgment from being carried out. If you meet the requirements for appeal as an indigent, you may be excused from the requirement that you pay past due rent in order to remain on the premises while the appeal is pending.

If one party appeals, there will be a completely new trial before a district court judge. (In some rare cases, the matter may be assigned first to an arbitrator. If that occurs contact the clerk to have the procedure explained to you.) The clerk will notify both parties of the trial date (usually by mailing the trial calendar), and both must appear at that time. If you are the defendant and don't appear at trial, the plaintiff will probably win the case. Both parties should bring all your evidence and witnesses to the trial. The trial before the district court judge will be more formal than the one before the magistrate; therefore, you may wish to consider hiring an attorney to represent you.

Notice to Plaintiff (Party Suing)

If you won your case, your judgment is good against the defendant for 10 years. Before the end of the 10 years, you may bring another lawsuit to extend the judgment an additional 10 years. If you have won a money judgment, it becomes a lien against any land owned by the defendant, which means the defendant cannot sell that land without paying your judgment. Just because you have a judgment does not mean that you will be able to collect it. The defendant must have enough property to enable the sheriff to sell the property to satisfy the judgment. You may try as many times in the 10-year period as you wish to collect the judgment.

If you have won a judgment that the defendant owes you money, the court cannot try to help you collect that money unless you have given the defendant an opportunity to claim his or her exemptions. After the judgment is rendered, you must get two forms (Notice of Rights and Motion to Claim Exempt Property) from the clerk. You must serve these on the defendant. The back of the Notice of Rights tells you how to serve the forms. If you have not heard anything from the defendant within 20 days after you have served the Notice of Rights and Motion, you may go to the clerk ask to have an execution issued. The back of the Notice of Rights form tells you what you have to bring to the clerk. If the defendant responds to your notice and claims exemptions, you may either (1) agree with the exemptions claimed and ask the clerk to issue an execution for non-exempt property or (2) object to the claimed exemptions and have the district court judge determine the exempt property. After the district judge determines the defendant's exemptions, you may ask the clerk to issue an execution for all nonexempt property. You will have to pay $40 to have an execution issued--$25 for the court and $15 for the sheriff. Those costs will be added to the judgment to be repaid by the defendant. An execution is an order to the sheriff to seize and sell property of the

defendant to satisfy the judgment. If you know of any property that belongs to the defendant, you should attach to the execution a description of the property and where it may be found to help the sheriff. The sheriff will sell any property that can be found and turn the proceeds over to the clerk of court, who will then turn the money over to you.

If the defendant pays all or part of the money owed to you directly, you MUST go to the clerk's office and indicate how much you have been paid.

If you have a judgment ordering the defendant to turn personal property over to you and if the defendant has not turned it over within 10 days after the magistrate enters the judgment, you may ask the clerk to issue a writ of possession to the sheriff. The cost to you for having the writ issued is $25, plus $15 for the sheriff. The sheriff will then try to recover the property from the defendant and turn it over to you. You may be asked to advance the costs of having the sheriff pick up the property.

If you are a landlord and have a judgment for eviction and the tenant fails to leave the premises within 10 days after the judgment was rendered, you may pay $25 and have the clerk issue writ of possession to the sheriff. The sheriff will then remove the defendant from the premises. You will have to pay the sheriff $15. You may be asked to advance the costs of removing the tenant's property and one month's storage costs or you may request the sheriff, in writing, to lock the premises and you will then be responsible for handling the tenant's property in the manner required by the law.

If the defendant won a judgment against you on a counterclaim, read the section below for defendants.

Notice to Defendant (Party Being Sued)

If a judgment is entered against you stating that you owe the plaintiff money and you want to pay the amount owed, it would be safer to pay the money to the clerk of court rather than to the plaintiff. If you do pay the plaintiff directly, make sure he or she notifies the clerk so the judgment won't continue to be listed against you. If you cannot or do not pay the judgment, the plaintiff will serve a notice of rights on you, telling you that you must claim your exemptions or they will be waived. It is very important that you respond to that notice. Exemptions are property the law allows you to keep from being taken from you to pay off judgments against you. If you fail to claim your exemptions, the sheriff will be able to seize and sell any property you own. If you fail to claim your exemptions when notified, you may ask the clerk to set aside your waiver if you have the grounds. Also, even if you have waived your statutory exemptions, you may go to the clerk any time up until the proceeds of the sale of your property have been distributed to the plaintiff and request your constitutional exemptions. The judgment is good against you for 10 years and may be extended for another 10 years. It becomes a lien against any land you own now or buy later until it is satisfied.

If you have a judgment against you to turn personal property over to the plaintiff, you may not prevent the property from being turned over to the plaintiff unless the plaintiff is a finance company and the judgment against you is to recover household goods that you listed as collateral in a security agreement with the finance company and the finance company did not lend you the money to buy those goods. In that case, the finance company must give you notice of your right to claim exemptions as described in the paragraph above and you may keep the household goods from being repossessed by claiming them as exempt.

If you are a tenant and have an eviction judgment against you, you will have to leave the premises. If you do not leave voluntarily, the sheriff may forcibly evict you and remove and store your belongings for you or may leave them with the landlord who may dispose of them in the manner allowed by the law. You will be held responsible for the costs of moving you out. It is possible that the landlord will let you stay if you pay all the back rent that you owe, but that is between the two of you.

If you won a counterclaim against the plaintiff in which you were awarded money, read the section for plaintiffs to see what to do.

Steps in Resolving Summary Ejectment Cases:

Step 1: Check for service.

No service: Is defendant present?

Service by posting: tell LL only judgment available is possession (unless defendant has made voluntary appearance). If complaint contains request for $$, ask if LL prefers to continue case to try for personal service.

Step 2: Ask for copy of lease.

Step 3: Establish existence of LL-T relationship between the parties.

Step 4 (could also reverse, do step 5 next, depending on information obtained thus far):

Is there a forfeiture clause in the lease? If so,

Identify the conduct that allegedly triggered the forfeiture clause (this will often be either failure to pay rent or criminal activity);

Identify any lease provision that controls conduct required by LL (for example, written notice to tenant of intent to enforce forfeiture clause);

Consider possible defenses: Waiver? Unconscionability?

Step 5: Determine what kind of lease it is.

Lease for definite time: determine date it ended. Does the lease contain rules about what should happen when lease ends? Possible defense: new lease created by conduct.

Lease for repeating period (example: month-to-month lease): Terminated by notice of intent to terminate. Questions: What does lease say about how termination must occur? If lease is silent, what evidence is there that LL gave statutory notice of intent to terminate?

Step 6: If termination is not available on above grounds, consider whether LL is entitled to prevail based on failure to pay rent. This is available only in cases in which the lease does not contain an applicable forfeiture clause. What evidence is there that LL demanded rent and waited 10 days before filing complaint? Note defense: tender.

Step 7: If LL is seeking money damages, calculate rent up to date of judgment. Be sure to note undisputed amount of rent on judgment form. Consider other amounts if sought: damage to property, late fees, administrative fees, attorney fees. Remember these have legal restrictions.

Step 8: Hand parties handout describing what happens next. If LL won, give both parties handout about tenant's rights with regard to property. Tell LL no writ of possession is available until 10-day appeal period has expired. Tell tenant that stay of execution is available in case of appeal, and that clerk can supply details about what the requirements are for obtaining a stay.

Essential Elements and Common Defenses in Summary Ejectment Actions

Breach of a lease condition

Plaintiff/LL must prove:
___ existence of a landlord-tenant relationship;
___ lease contains a forfeiture clause;
___ tenant breached lease condition for which forfeiture is specified;
___ LL followed procedure set out in lease for declaring a forfeiture and terminating the lease.

Most common defenses: failure to follow proper procedure, waiver

Failure to pay rent

Plaintiff/LL must prove:
___ existence of a landlord-tenant relationship;
___ terms of the lease related to obligation to pay rent;
___ lease does NOT contain forfeiture clause;
___ LL demanded that tenant pay rent on certain date;
___ LL waited at least 10 days after demand to file this action;
___ tenant has not yet paid the full amount due.

Most common defenses: failure to make proper demand and wait ten days, tender

Holding over

Plaintiff/LL must prove:
___ existence of a landlord-tenant relationship;
___ terms of lease related to duration;
___ if lease is not for a fixed term, that proper notice was given of intent to terminate;
___ tenant has not vacated.

Most common defenses: waiver, improper notice.

Summary Ejectment for Criminal Activity

Step 1: What are the grounds?

--Breach of a lease condition (involving criminal activity), or

--G.S. Ch. 42, Article 7: Expedited Eviction of Drug Traffickers and Other Criminals

What the rules are depends on what the grounds are.

Breach of a lease condition:

--Check for forfeiture clause.

Public housing cases will always have written lease with forfeiture clause.

Example:

The Landlord may terminate this lease for. . .

(1) Drug-related criminal activity engaged in, on, or near the premises, by any tenant, household member, or guest, and any such activity engaged in or on the premises by any other person under the tenant's control; . . .

2) Criminal activity by a tenant, any member of the tenant's household, a guest or another person under the tenant's control

--that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents, or -that threatens the health. . . by persons residing in the immediate vicinity of the premises.

Questions to ask:

1. Who? Tenant is clear, and so is household member. A guest is defined by HUD as "a person temporarily staying in the unit with the consent of a tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant." A "person under the tenant's control," on the other hand, is defined as "a person, although

not staying as a guest . . . in the unit, [who] was at the time of the activity in question on the premises because of an invitation from the tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant."
Considerable litigation has focused on what it means to be "under the tenant's control." Consider whether person was on premises as result of invitation, or did she "just drop by"? Under the "One Strike" policy endorsed by HUD, a tenant is strictly liable for a person's conduct while on the premises, if they are there with consent, even if the tenant is not aware of the specifics of the conduct, or could not have reasonably foreseen the conduct.
"Innocent tenant" situation was addressed in cases involving public housing authorities by HUD v. Rucker, 535 U.S. 125 (2002), holding that PHA can elect to evict even if tenant was without fault (overruling a number of cases holding that PHA must demonstrate fault on part of tenant in order to deprive tenant of property interest in leasehold).
Note: Rucker upheld only the PHA's **right** to elect eviction. Immediately after the case was handed down, the Secretary of HUD sent the following letter to all PHA:

"I would like to urge you, as public housing administrators, to be guided by compassion and common sense in responding to cases involving the use of illegal drugs. Consider the seriousness of the offense and how it might impact other family members. Eviction should be the last option explored, after all others have been exhausted."

Note: Rucker applied to public housing authority cases. Whether it also applies to cases brought under Section 8 or other federally-supported housing has been debated, and the answer is not clear. No North Carolina law specifically addresses the issue.

2. What?

In the lease provision quoted above, there are several important things to notice about what activity may result in termination.

HUD's definition of "drug-related criminal activity" is use or possession with intent to sell, distribute or use". Some courts in other states have interpreted this language as excluding simple possession, but there is significant disagreement within the legal community about which interpretation is correct.

The impetus for including this lease provision in public housing leases was concern about those communities becoming overrun with drug traffickers, and leases usually contain several provisions addressing the issue of substance abuse by tenants. The inclusion of "other criminal activity" expresses a more limited concern, and it is accordingly more limited. Other criminal activity is ground for eviction only if the activity threatens the health, safety, or right to peaceful enjoyment of other tenants or neighbors. This wording indicates that the landlord must demonstrate more than criminal behavior—that there

must be in addition some reasonable basis for concluding that the activity itself threatens protected others in one of the specific ways.

The law is clear that a conviction is not required, nor is it even necessary that the person in question be charged. The court's determination of whether the lease provision has been breached is independent of the judicial system's criminal process. If a particular behavior HAS resulted in a conviction, that finding that the person engaged in that behavior is binding on the small claims magistrate. On the other hand, if a person has been acquitted, the magistrate may still find that the activity occurred, due to the lesser burden of proof applicable in civil court.

Some leases have specific provisions concerning "violent" criminal behavior, and there may not be the same requirement that such behavior affect the health, safety, or peaceful enjoyment of the premises. The magistrate must carefully read the specific language to ascertain whether a breach of the lease occurred.

Sometimes a question is raised about whether unlawful behavior is "criminal", either because the behavior in question is an infraction under state law, or because the behavior results in a juvenile proceeding (which is technically distinct from a "criminal" prosecution). Because there is no law deciding this question, a magistrate is left to a careful consideration of the language of the lease and the behavior in question, in light of the underlying policies for de-criminalizing certain behaviors and favoring increased safety in federally-subsidized housing.

3. Where? One of the issues present in many cases involves where the activity occurred. In the above lease provision, note that a different rule applies depending on the status of the wrongdoer: drug-related criminal behavior may occur in, on, or near the premises if the person involved is a tenant, household member, or guest, but must occur in or on the premises if the person is a "other person under the tenant's control." Other lease provisions may contain language such as "on or off" the premises, applicable to certain types of activity. A determination of whether a lease condition is breached will require consideration not only of WHAT the behavior was, but also WHERE it occurred.

   The location of the activity may be important in two other ways. First, behavior that happens away from the rental property may be much less likely to affect the health, safety, and right to peaceful enjoyment of protected persons. Second, as the specific language of the lease provision above indicates, the question of whether an invitee is "under the tenant's control" becomes much more difficult to demonstrate when that person is away from the rental premises.

4. When? Sometimes the timing of the activity is an issue that needs to be considered. Generally, criminal behavior occurring prior to the tenancy will not satisfy the requirement of "threatening the health, etc." In some cases, however, a magistrate might

find that prior criminal behavior DOES support a finding that the health and safety of the other residents and neighbors are threatened. One example might be the case of a chronic sex offender. Often, the lease will contain specific provisions that may also apply, addressing chronic substance abuse, failure to disclose relevant information in the rental application, or violent behavior.

If the magistrate determines that the lease contains a forfeiture clause prohibiting certain behavior, and that that lease condition has been violated, the next inquiry is whether the landlord followed appropriate procedure in terminating the lease. How will the magistrate know what appropriate procedure is?

First, the lease itself will often set out the procedure for terminating a lease. One lease used by HUD-assisted landlords says, for example:

The landlord's termination notice shall be accomplished by (1) sending a letter by first class mail, properly stamped and addressed, to the tenant at his/her address at the project, with a proper return address, and (2) serving a copy of said notice on any adult person answering the door at the leased dwelling unit, or if not adult responds, by placing the notice under or through the door, if possible, or else by affixing the notice to the door. Service shall not be deemed effective until both notices provided for herein have been accomplished

This lease contains other provisions concerning the content of the notice of termination, including a requirement that the tenant be advised of his right to meet with the landlord to discuss the proposed termination upon request during the ten days following the notice. Whatever the lease requires, in terms of procedural protections for tenants threatened with eviction, the landlord must provide in order to satisfy the requirements for obtaining a judgment awarding possession.

The second source of information for the magistrate concerning required procedure are HUD regulations specifying the procedure for termination. While these requirements are often incorporated into the lease, this is not always the case. If an attorney for the tenant attempts to defend on the grounds that proper HUD procedure was not followed, the magistrate should ask to be supplied with a copy of the relevant regulations and should give the landlord an opportunity to respond.

If a landlord successfully demonstrates that a breach of the lease condition resulting in forfeiture has occurred, and that proper procedure has been followed in exercising that right of forfeiture, there are two significant additional considerations for the magistrate before deciding on a judgment.

First, in 2005, Congress passed the Violence Against Women Act (42 USC 1437d), which responded to the troubling situation created when an act of domestic violence is perpetrated against a public housing tenant on the premises. All too often, this criminal activity resulted in

eviction of the tenant/victim, leaving other potential victims forced to choose between submission to domestic violence or eviction from low income housing. The federal law provides that individuals cannot be evicted for domestic violence perpetrated by others unless the landlord demonstrates that continued tenancy would pose "an actual and imminent threat" to other persons on the property. Landlords have the option of a "bifurcated" lease (similar to NC's partial eviction), authorizing landlords to evict only the perpetrator. Landlords may require certain specified documentation of the tenant's status as a domestic violence victim.

The second qualification restricting a landlord's right to evict based on breach of a lease condition was established in a recent Court of Appeals case, Lincoln Terrace Associates v. Kelly, 179 N.C. App. 621 (2006). In Lincoln Terrace, a tenant receiving federally assisted housing was threatened with eviction for criminal behavior by one family member, who damaged property, assaulted another tenant, and disturbed and harassed other tenants, all in violation of a specific lease provision. Faced with these facts, the Court of Appeals said:

In order to evict a tenant in North Carolina, a landlord must prove: (1) That it distinctly reserved in the lease a right to declare a forfeiture for the alleged act or event; (2) that there is clear proof of the happening of an act or event for which the landlord reserved the right to declare a forfeiture; (3) that the landlord promptly exercised its right to declare a forfeiture; and (4) that the result of enforcing the forfeiture is no unconscionable.

The Court also said:

When termination of a lease depends upon notice, the notice must be given in strict compliance with the contract as to both time and contents.

In this case, the property manager testified to having given proper notice, but failed to introduce a copy of the actual notice in support of the landlord's claim. The Court of Appeals found that the landlord was not entitled to a judgment on these facts.

Waiver as a defense?

Most public housing leases provide that a landlord does not waive the right to seek ejectment based on criminal activity by continuing to accept rent. G.S. 157-29(d) goes further and specifies that in North Carolina, whether or not the lease is silent about waiver, no waiver occurs unless the housing authority fails to notify the tenant within 120 days that a violation has occurred or to take steps to seek a remedy for the violation.

G.S. Ch. 42, Art. 7: Expedited Eviction of Drug Traffickers and Other Criminals

North Carolina has its own version of the federal law we've been discussing, set out in G.S. 42-59 through -76 (sometimes referred to Article 7 evictions). Because HUD requires leases to contain a forfeiture provision applicable to criminal activity, landlords participating in HUD housing will generally choose to proceed under breach of a lease condition—federal law is generally more favorable to them. Consequently, Article 7 is more typically relied upon by private landlords --who do not have the protection of a relevant forfeiture clause --confronted with a tenant's criminal activity. While very similar to federal law, Article 7 contains some important differences.

Complete eviction.

Grounds:

The landlord must prove one of the following five things to evict the tenant (which includes everyone taking under the tenant):

(1) Criminal activity occurred on or within the individual rental unit leased to the tenant. Criminal activity is:
   a. conduct that would constitute a drug violation under G.S. 90-95 (except possession of a controlled substance);
   b. any activity that would constitute conspiracy to violate a drug provision;
   c. or any other criminal activity that threatens the health, safety, or right of peaceful enjoyment of premises by other residents or employees of landlord.

   "Individual rental unit" means an apartment or individual dwelling or accommodation that is leased to a particular tenant.

(2) The individual rental unit was used in any way in furtherance of or to promote criminal activity.

(3) The tenant, any member of the tenant's household, or any guest of the tenant engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises.
   a. "Entire premises" means a house, building, mobile home or apartment that is leased and the entire building or complex of which it is a part, including the streets, sidewalks, and common areas.

(4) The tenant gave permission to or invited a person to return to or reenter the property after that person was removed and barred from the entire premises.
   a. The person could have been barred either by a proceeding under Article 7 of General Statutes Chapter 42 or by reasonable rules of a publicly-assisted landlord.

(5) The tenant failed to notify a law enforcement officer or the landlord immediately upon learning that a person who was removed and barred from the tenant's individual unit had returned to the tenant's rental unit.

Affirmative defense. The landlord need not prove that the tenant was at fault. However, the tenant may raise and prove such a claim as an affirmative defense to the eviction.

If the landlord proves one of the five grounds for eviction, the tenant may avoid complete eviction by proving that

he or she was not involved in the criminal activity and

did not know or have reason to know that criminal activity was taking place or would likely occur on or within the individual rental unit, that the individual rental unit was used in any way in furtherance of or to promote criminal activity, or that any member of the tenant's household or any guest engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises; or

had done everything that reasonably could have been expected under the circumstances to prevent the commission of criminal activity, such as requesting the landlord to remove the offending household member's name from the lease, reporting prior criminal activity to appropriate law enforcement authorities, seeking assistance from social service or counseling agencies, denying permission, if feasible, for the offending household member to reside in the unit, or seeking assistance from church or religious organizations.

G.S. 42-64 provides that if tenant establishes affirmative defense court shall refrain from ordering the complete eviction of tenant.

A second time is harder: A tenant may not successfully use one of these affirmative defenses if the eviction is a second or subsequent proceeding brought against the tenant for criminal activity unless the tenant can prove by clear and convincing evidence that no reasonable person could have foreseen the occurrence of the subsequent criminal activity or that the tenant had done everything reasonably expected under the circumstances to prevent the commission of the second instance of criminal activity.

Relief on grounds of injustice. Even if the landlord has proved grounds for eviction, a magistrate may choose not to evict the tenant if, taking into account the circumstances of the criminal activity and the condition of the tenant, the magistrate finds, by clear, cogent, and convincing evidence, that immediate eviction or removal would be a serious injustice, the prevention of which overrides the need to protect the rights, safety, and health of the other tenants and residents of the leased residential premises.

It is not a defense to an eviction that the criminal activity was an isolated incident or otherwise had not reoccurred or that the person who actually engaged in the criminal activity no longer resides in the tenant's individual unit, but such evidence can be considered if offered to support affirmative defenses or as grounds for the magistrate to choose not to evict the tenant.

Connection between eviction and criminal charges. Just as in the case of breach of lease conditions, discussed earlier, a landlord may pursue an eviction for criminal activity even though no criminal charge has been brought. If criminal charges have been brought, the eviction may go forward before the criminal proceeding is concluded or if the defendant was acquitted or the case dismissed. If a criminal prosecution involving the criminal activity results in a final conviction or adjudication of delinquency, conviction or adjudication is conclusive proof in the eviction proceeding that the criminal activity took place.

Defense of waiver of breach does not apply. G.S.. 42-73 specifically provides that landlord is "entitled to collect rent due and owing with knowledge of any illegal acts that constitute criminal activity without such collection constituting waiver of the alleged defaults."

Conditional eviction:

The magistrate may issue against a tenant when the landlord proves that the criminal activity was committed by someone other than the tenant and the magistrate denies eviction of the tenant or the magistrate finds that a member of the tenant's household or the tenant's guest has engaged in criminal activity but that person was not named as a party in the action.

A conditional eviction order does not immediately evict the tenant, but rather provides that as an express condition of the tenancy, the tenant may not give permission to or invite the barred person to return to or reenter any portion of the entire premises. The tenant must acknowledge in writing that he or she understands the terms of the court order and that failure to comply with the court's order will result in the mandatory termination of the tenancy.

A landlord, who believes that a tenant has violated a conditional eviction order, may file a motion in the cause in the original eviction case. That motion shall be heard on an expedited basis and within fifteen days of service of the motion.

At the hearing, the magistrate shall order the immediate eviction of the tenant if the magistrate finds that:

(1) the tenant has given permission to or invited any person removed or barred from the premises to return to or reenter any portion of the entire premises;
(2) the tenant has failed to notify appropriate law enforcement authorities or the landlord immediately upon learning that any person who had been removed and barred has returned to or reentered the tenant's individual rental unit;
(3) or the tenant has otherwise knowingly violated an express term or condition of any order issued by the court under this statute.

Partial eviction.

Magistrate may order removal from a tenant's premises of a person other than the tenant (and not disturb the tenant) when the magistrate finds that person has engaged in criminal activity on or in the immediate vicinity of some portion of the entire premises.

For the magistrate to have jurisdiction to remove a person other than the tenant (and not the tenant), the person to be removed must have been made a party to the action. If name of person is unknown, complaint may name defendant as "John (or Jane) Doe", stating that to be a fictitious name and adding a description to identify him or her.

Any person removed also is barred from returning to or reentering any portion of the entire premises.

Fees in Summary Ejectment Actions

For Leases Entered Into On or After Oct. 1, 2009

Late Fees

In residential leases, parties may agree to late fee for payments five or more days late. When rent is paid monthly, the maximum fee is $15 or 5%, whichever is greater. In case of weekly rent, maximum is $4 or 5%, whichever is greater.

Complaint Filing Fee

Authorized for written leases not to exceed $15 or 5%, whichever is greater, only if:
---tenant was in default
---LL filed complaint for SE
---tenant cured the default
---LL dismissed the claim.
Fee may be charged as part of amount required to cure default.

Court-Appearance Fee

Authorized for written leases, equal to 10% of monthly rent if
---tenant was in default
---LL won a SE action
---neither party appealed.

Second Trial Fee

Authorized for written leases in event of new trial following appeal from small claims judgment. Not to exceed 12% of monthly rent. Available if
---tenant was in default
---LL prevailed

Additional Rules

LL can charge only one of the last three fees, and that fee may not be deducted from subsequent rent payment or asserted as ground for default in subsequent SE action. Prohibits LL from attempting to charge a larger fee and provides lease provision in violation of law is void.

Legal Issues Related to Tenants' Personal Property

Residential Leases: Property Other Than Mobile Home and Contents.

A landlord has no authority to do anything with a residential tenant's property until the landlord has brought a summary ejectment action, won a judgment for possession, and had the sheriff execute a writ of possession to enforce the judgment. At that time, the sheriff will remove and store the property, and the landlord is required to advance the cost of removal and one month's storage, charged as costs recoverable from the tenant. If a landlord prefers, the sheriff will padlock the premises instead, leaving the tenant's property in place. Thus, the need for the landlord to deal with the tenant's property will arise only if the landlord selects the padlocking method of execution.

The law specifies the rules that apply during the ten-day period following padlocking by the sheriff:

(1) During this time the landlord may either remove and store the property, or leave it on the premises.
(2) If the tenant requests the property during this ten-day period, the landlord must release the property to the tenant during regular business hours or at an agreed-upon time.

At the end of the 10 days, if the property remains on the premises, the landlord has three choices: he may (1) throw it away, (2) give it away, or (3) sell it. The law does not specify any particular procedure for the first two methods of disposal, but a detailed procedure governs sale of the property.

Numerous statutory provisions govern a landlord's sale of tenant's property, but in broad terms the procedure is as follows: First, the landlord must give written notice to the tenant by first-class mail to the tenant's last known address at least seven days before the date of the sale. This notice must specify the time and place of the sale, how any surplus proceeds can be claimed by the tenant, and what happens to that sum it if not claimed. At any time before the day of sale, the tenant is entitled to recover his or her property upon request. The statute does not detail a particular procedure for how the landlord must conduct the sale, or what kind of advertising, if any, is required. (It is unclear whether the court would impose some reasonableness standard on the manner of sale.) The landlord may apply the proceeds of sale to unpaid rent, other damages, storage fees, and sale costs. Any amount left over is to be given the tenant upon request, within ten days of the sale. If the tenant does not make a request for the surplus within ten days, the law requires the landlord to hand the money over to the county government of the county in which the real property is located.

Special Rule for Property Valued at Less Than $100:

If the total value all of the personal property left on the premises is less than $100, the property is considered abandoned five days after execution of a writ of possession. At that time the landlord may throw away or dispose of the property. If, before the five days are up, the tenant requests return of the

property, the landlord must release possession to the tenant during regular business hours or at a time agreed upon.

An Alternative Disposal Method for Property Valued at $500 or Less

If a tenant abandons personal property with a total value of $500 or less, or fails to remove such property at the time of execution of a writ of possession, the landlord may immediately remove the property and deliver it to a nonprofit organization. The organization must be one that regularly provides free or very law-cost clothing and household furnishings to people in need. The landlord is required to notify the tenant of the name and address of the non-profit organization to which the tenant's property was delivered by (1) posting notice at the rental premises; (2) posting notice at the place where the rent is received; and (3) by mailing a copy of the notice by first-class mail to the tenant's last known address. This disposal method is seldom used, perhaps because the law requires the nonprofit organization to agree to separately store the tenant's property for thirty days. If the tenant requests return of his property during that time, the organization must release the property to the tenant at no charge.

Residential Leases: Mobile Home and Contents.

A specific statute regulates the situation in which the rental property consists of a mobile home space, and the property left behind consists of a mobile home and its contents. The general procedure described above applies when the mobile home is of little value. But when the mobile home has a fair market value of more than $500, and the property is titled in the name of the tenant, the landlord may acquire a landlord's lien on the mobile home and contents, as provided in G.S. 42-2(e2). For the lien to come into existence, the following requirements must be satisfied:

(1) The landlord must get a judgment for possession and must have a writ of possession issued to enforce the judgment. (After the writ has been executed, the landlord may immediately remove the property from the land and store it.)
(2) The tenant does not take possession of the mobile home and contents within the 21-day period following execution of the writ. (The landlord is required to release the mobile home and contents to the tenant during regular business hours, or at a time mutually agreed upon, at any point within the 21-day period.)

If these requirements are met, the landlord acquires a lien on the property for (1) the amount of rent due at the time the tenant vacated the premises; (2) for rent accruing between the time tenant vacated the premises and the date of sale (up to a maximum of 60 days); (3) for physical damages to the property beyond normal wear and tear; and (4) for reasonable costs and expenses of the sale.

To enforce this lien, the landlord must dispose of the property by selling it at a public auction. Detailed requirements govern the procedure for such a sale; these requirements are set out in G.S. 44A-4(e). For example, the statute requires the landlord to post the notice of sale at the courthouse and to advertise in a newspaper in certain instances, and to provide the tenant and other interested parties with notice of the sale. A landlord who fails to comply with the statutory procedure may be required to pay damages under G.S. 44A-4(g).

In every case involving sale of a mobile home, regardless of its value, two additional requirements apply: First, because the mobile home is a motor vehicle, the landlord may not sell the mobile home without notifying DMV and getting permission to sell the vehicle. Second, the purchaser may not move the mobile home without first getting permission from the local tax collector.

Commercial Leases

Landlord may sell property to satisfy lien:

Property left behind by commercial tenants is subject to disposal pursuant to G.S. 44A-2(e), which creates a possessory lien in favor of the landlord on furniture, furnishings, trade fixtures, equipment and other personal property. This lien, although similar to that described above, is distinct, and should not be confused with a landlord's lien on a mobile home and its contents. A brief summary of this commercial landlord's lien follows:

Under G.S. 44A-2(e) if property has been left on premises for at least 21 days after tenant vacated premises and landlord has a lawful claim for damages against tenant, the landlord may sell property. The lien is for amount of rent due at time tenant vacated and for the time, up to 60 days, from the vacating of the premises to the date of sale; for any sums necessary to repair damages to the premises caused by the tenant, except for normal wear and tear; and for the reasonable costs and expenses of selling the personal property. At any time before the expiration of the 21-day period, upon tenant's request, the landlord must return the property to tenant. If landlord sells the property, the requirements for public sale under G.S. 44A-4 must be satisfied. This lien does not have priority over any prior perfected security interests.

Landlord may remove and store property:

The landlord is authorized by G.S. 44A-4(e) to remove tenant's property from the premises and place it in storage at the earlier of two events: (1) 21 days have passed since the tenant vacated the premises, or (2) 10 days have passed after the landlord has received a judgment for possession. Remember that property placed in storage continues to belong to the tenant, and may be recovered from storage by tenant.

If property stored with person who in ordinary course of business stores property, that person will have a storage lien under G.S. 44A-2(a) and may require the tenant to pay the storage costs before releasing the property to him. (If property stored in self-storage facility, owner is entitled to a lien under G.S. 44A-41.)

Landlord may donate property to charity:

Under G.S. 44A-2(e) if the total value of all property remaining on the rental premises is less than $100, the landlord may remove the property and donate it to any charitable organization, provided that more than five days have passed since tenant vacated or sheriff padlocked the premises.

Note: This overview of legal provisions relevant to landlords' treatment of tenants' property remaining on rental premises has been prepared for use by North Carolina magistrates as a general summary of the law. It is not intended to be, and should not be relied upon as, a comprehensive and timely statement of all relevant legal provisions.

Big Law: Summary Ejectment and Mobile Homes

This week I'm going to share some questions I've received from magistrates, involving mobile homes. I'll set out the facts for all three cases first, and then discuss how each might be resolved. For each case, ask yourself what you would do –or what additional information you might need—and then go on and read the discussion. Because I'm using these fact situations as a springboard to discuss various legal principles related to summary ejectment, the discussion for each is longer than would be necessary to decide the particular case. So, if you're a cut-to-the-chase kind of judge, you can flip to the end of this document and simply read the principles listed under Summing Up.
Thanks, as always, to the magistrates who wrote in with these questions!

A Tale of Two Counties (And Too Many Parties!)

A mobile home, owned by Owen, is located on land owned by Larry Landlord. Larry lives in your county, and the mobile home is located in your county, but Owen lives in another county. Owen rents his mobile home to Tammy Tenant. So, Tammy pays rent to Owen for the mobile home, and Owen pays rent to Larry, for the mobile home lot. In February, Tammy made her usual payment to Owen, but Owen just lost his job, so he didn't make his usual payment to Larry. When Owen defaults, Larry wants to bring a summary ejectment action. Can Larry bring an action for summary ejectment? Where, and against whom?

A Piece of Junk

A man named Sam came in today asking for help. About a year ago, Sam agreed to sell a mobile home lot to a man named Bob with the understanding that Bob would pull a brand-new 14x80 mobile home onto the lot. This part of the agreement was not put in writing. Sam just wrote down that he was selling the lot to Bob so that Bob would have something in writing to give to FEMA. Since then, Bob hasn't made any payments to Sam, and instead of a nice new mobile home, Bob has pulled a used "piece of junk" onto the lot. Bob hasn't even hooked the trailer up and is not living in it, but he refuses to move the mobile home.
Could Sam use summary ejectment to recover possession of the lot? How do you answer Sam's question about how he can get this "piece of junk," as he refers to it, off the property?

"I Get Sixty Days!"

Larry Landlord has brought an action for summary ejectment based on failure to pay rent against Tommy Tenant. Larry's evidence shows that Larry rents space in a mobile home park to Tommy. The parties entered into a month-to-month lease, with Tommy responsible for paying $150 on the first of the month. The lease was written, but Larry didn't bring a copy of the lease with him to court. Both parties agree, however, on the essential terms of their agreement. On January 15, 2010, Larry gave Tommy notice that he intended to end the lease on February 28. Tommy saw no reason to pay rent on February 1, since he was being forced out at the end of the month. Larry filed this action on March 1. Tommy argues that he should have received 60 days notice, since it takes quite a long time to make arrangements to move a mobile home. How do you rule?

A Tale of Two Counties . . .

To correctly answer this question, a magistrate must know two legal rules:

Legal Rule #1: **A landlord may bring an action for summary ejectment only against his or her tenant.** This is another way of stating the familiar rule that a landlord-tenant relationship must exist between the parties in an action for summary ejectment. Larry hasn't received rent for the lot, and the only person he can sue is the person who rents the lot from him: Owen. Larry doesn't care who's actually living on the lot, or what Owen's reasons might be for failing to make his lot rent payment on time. For Larry, it's simple: Owen agreed to pay him lot rent, and he hasn't paid.

Legal Rule #2: **An action for summary ejectment must be brought in the county in which the defendant resides.** We've said that Owen is the proper defendant, so Larry must file his action in the county where Owen lives. It makes no difference that the mobile home is actually located in a different county.

You may have noticed that this mechanical application of the rules fails to address an important question: what happens to Tammy? Shouldn't she be a party to this lawsuit? Is she at least entitled to notice that Larry has filed for summary ejectment, so that she could either prepare to leave, or decide to pay the lot rent herself in order to avoid eviction? Is it fair that she be evicted when she's made all rent payments on time and has done nothing wrong? Answers: No, no, and who knows?

Remember that the "rental property" in this case is the lot itself. The mobile home, so far as Larry is concerned, is personal property, just like a tenant's car or washing machine. Consequently, when the deputy goes out to serve the writ of possession, his or her duty is to remove the tenant (Owen) and all those who "take through" the tenant. Usually the people taking through the tenant are members of the tenant's family, but sometimes, as in this case, it's a sublessee--Tammy. The writ also requires the deputy to remove the tenant's property, if the tenant isn't prepared to do so. In this case, then, the deputy will tell Tammy (who "takes through" Owen) that she must leave. The deputy will also remove the mobile home itself, along with all its contents, and place it in storage. In practice, this seldom happens, because the landlord usually opts to have the mobile home padlocked, but left in place. Why do landlords pass up this opportunity to let the deputy worry about removing the mobile home? Because the deputy will remove it only if Larry pays the cost of removal and the first month's storage. The law provides that these costs will be added to court costs in the case, and that Larry is entitled to recover these expenses from Owen. As a practical matter, though, Larry may be doubtful about his ability to do so. Furthermore, Larry may wish to assert a "landlord's lien" under GS Ch. 44A; in this case he may want to hold on to the mobile home in order to sell it. In any event, Tammy, having paid for the right to exclusive possession of the mobile home, will be forced to vacate. In the eyes of the law, Tammy is not a party to the lease agreement between Owen and Larry, and thus she is not a necessary party to the lawsuit, nor is she entitled to notice that a judgment has been entered that will require her to vacate the property.

At first glance, this seems unfair. But remember that the law safeguards the right to freely contract, even when that right is the right to make a bad deal. Tammy either knew or could have discovered before renting the mobile home that Owen did not own the lot. The law assumes that contracting parties ask appropriate questions and make considered decisions before entering into legally binding agreements. The fundamental premise, then, is that Tammy knowingly placed herself in a more vulnerable position in exchange for some benefit—presumably, lower rent.

If you don't find the foregoing observation all that comforting, I think you'll like this one better. Tammy can sue Owen for the damages incurred as a result of his breach of contract with Tammy. By renting the mobile home to Tammy for one year, Owen implicitly agreed not to do anything that would prevent her

from having access to the mobile home. Thus, Owen is likely to be held liable for the damages caused by his failure to do so. (Of course, if Tammy's lease contains a provision saying that Owen is not responsible for paying lot rent, the result would be different.) Tammy might even have an unfair trade practice claim (with the attendant attorney fees and treble damages) against Owen, especially if he accepted rent from Tammy without informing her that the sheriff would be stopping by soon to evict her.

A Piece of Junk . . .

One issue that parties never bring up, but that magistrates nevertheless frequently confront in summary ejectment cases is the issue of whether a landlord-tenant relationship exists between the parties. It helps to think of summary ejectment as a tool developed for a very specific purpose, which may be used ONLY for that purpose: *to provide a mechanism for landlords to quickly regain possession of rental property (provided they have evidence supporting their right to do so), so that they may quickly re-rent property and thus avoid lost rental income.* The key terms in the preceding sentence are *landlords, rental property*, and *rental income*. The law does not allow use of this special tool to remove unwanted relatives, old girlfriends, or buyers who violate their purchase agreements, whether by failing to make payments or, as here, breaching some other provision of the sale contract. The oft-repeated statement that a landlord-tenant relationship is required in these cases is simply another way of saying that **a landlord must have filed the case in order to recover possession of rental property**. In this case, Sam is clearly not a landlord, and the lot is not rental property. Sam has no basis for filing a claim for summary ejectment.

But what about Sam's other question: how can he have the mobile home removed from his property? Many magistrates are asked this question often. It helps to stop and consider what Sam is actually asking. Sam wants advice about how to accomplish three goals: (1) He wants the home removed; (2) he does not want to have to pay to have it removed; and (3) he does not want his removal of the home to result in a lawsuit or a criminal prosecution. Unfortunately, he probably has a fourth goal: Sam doesn't want to have to pay an attorney for advice about how to accomplish the first three goals. What Sam wants—quite understandably—is legal advice about how to accomplish his goals without having to pay for it. Unfortunately, Sam's first three goals are not easily accomplished, even by a competent attorney, and a magistrate should not even consider attempting to advise him. No matter how much you might wish to be helpful to Sam, or how sympathetic you feel toward him, his need in this situation is clearly for legal advice: he's seeking a **recommendation** developed after **applying the precepts of both statutory law and North Carolina appellate case law** to the **particular detailed facts** of this case, accompanied by an **assessment of the risks** associated with each alternative course of action. No doubt, Sam wishes for a clear-cut and easy answer to his dilemma, but no such answer exists, and a magistrate is ill-advised to attempt to come up with one. (I hope it is clear, in light of the above discussion, that telling Sam he can burn down the mobile home is a bad idea.)

"I Get Sixty Days!" . . .

Remember the familiar rule that **in summary ejectment cases the first question that must be answered is "What are the grounds for summary ejectment?"** In this case, with no evidence of criminal activity, there are three possible grounds: (1) *Breach of a lease condition*; (2) *Failure to pay rent*; and (3) *Holding over*. As we've said before, regardless of which block the plaintiff checks on the complaint, or what the plaintiff says in court, summary ejectment is appropriate if plaintiff is entitled to it on <u>any</u> of the three grounds. Let us begin, then, with Ground #1: *Breach of a lease condition*.

The most important thing to remember about *Breach of a lease condition* is that this basis for summary ejectment is contractual—it comes into existence when the parties agree to it in the lease. Regardless of the particular language used, it boils down to one thing: the parties agree that in the event the tenant violates a particular condition of the lease, the landlord has the right to terminate the lease and require the tenant to leave. This is called a *forfeiture clause.* Because it is contractual in nature—in other words, the court is merely enforcing whatever the parties agreed to—the specific terms of the particular lease provision govern. If a certain notice is required by the lease, for example, the landlord must follow that requirement. In this case, the landlord has presented no evidence as to whether the lease contains a forfeiture clause, because he has not included the lease itself as part of his proof. So, what about that? What should a magistrate do when the landlord doesn't have a copy of the lease to show the court?

In North Carolina, a lease may be written or oral, and the terms of an oral lease are of course proven by testimony of the parties. A different rule applies, however, when a lease is written: ***A copy of the written lease must be provided to the court and admitted into evidence.*** This rule, descriptively known as The Best Evidence Rule, simply states that the best evidence of the contents of a written agreement is the agreement itself, and so must be produced by the party seeking to enforce the agreement. Because the Rules of Evidence are typically relaxed in small claims court, many magistrates have traditionally accepted oral testimony in lieu of a written lease in the absence of objection by the tenant. This is a risky practice, however, because a party's testimony about the terms of a lease may be incomplete or inaccurate, whether intentionally or inadvertently. All of us have encountered landlords who use form leases, and tenants who sign them, without actually knowing what the lease says. If you do not presently require landlords to produce a copy of the lease (in District Court, the original document would be required), you should consider changing your practice. Only by examining the lease itself can you be certain that your decision in a case is supported by the lease agreement between the parties.

In the case we're discussing, why would you like to see a copy of the lease? Because the landlord is basing his argument on Ground #2, *Failure to Pay Rent*. This basis for summary ejectment is available, however, only if the lease does NOT contain a forfeiture clause. In plain English, the law is saying that **our first choice is to enforce whatever the parties agreed to in the lease,** so if there's a forfeiture clause in the lease, that's what we go by. ***If and only if*** **the parties did not agree about what happens if the tenant fails to pay rent, the landlord may seek to recover possession under Ground #2.** In a sense, then, part of what a landlord must prove in order to recover under Ground #2 is that the lease does NOT contain a forfeiture clause.

Aside from his failure to prove the contents of the lease, what do you think about Larry's argument for eviction based on failure to pay rent? The evidence is undisputed that rent was due on February 1, and that Tommy made no payment. Is this enough? No, because Larry hasn't introduced evidence that he made demand and then waited ten days before filing this action. Strike 2 for Larry.

Turning our attention to Ground 3, *Holding over*, we recall that the notice typically required for a month-to-month lease is seven days prior to the end of the rental period. By giving notice on January 15 that he intends to terminate the rental on February 28, Larry was being quite generous by ordinary standards. After all, if the rental property in question had been an apartment, Larry could have terminated the lease on January 31! One and one-half months notice is not sufficient, however, when the rental property is a mobile home, and Tommy is correct in his contention that he is entitled to 60 days notice. Strike 3 for Larry.

We're going to change the facts now to illustrate a frequent error made in connection with the 60-day rule. Imagine that Larry does bring his written lease to court, and low and behold, it contains a forfeiture clause! The lease provides that the landlord has the right to terminate the rental agreement immediately if the tenant is more than 5 days late in paying rent. Larry wins based on Ground #1, *Breach of a lease condition*. "Wait a minute," says Tommy. "This is a mobile home. These things take time. I get sixty days before I have to move." What do you say to Tommy? "WRONG." The sixty-day rule applies only when the basis for summary ejectment is holding over. Tenants are not entitled to sixty days in which to remain on the property rent-free, to engage in criminal activity, or to violate other lease conditions. When a landlord is able to prove a basis for summary ejectment other than holding over, the sixty-day rule does not apply.

Summing Up

As you all know, it's hard for a lawyer to say a simple sentence. We feel compelled to follow any simple statement by saying "but," "unless," "except" or "provided that." There's an exception for every rule. Sometimes, though, it helps just to focus on the rule. So here are the rules—unburdened by exceptions—that will steer you right MOST of the time.

The only person a landlord can sue for summary ejectment is that landlord's tenant.

An action for summary ejectment may be filed only by a landlord seeking to recover possession of *rental property*.

An action for summary ejectment must be brought in the county in which at least one tenant resides.

A judgment for summary ejectment is effective against the tenant/defendant named in the complaint and against all who "take through" that tenant.

A sub-lessee may have a claim for damages against a sub-lessor when the sub-lessor's actions result in the sub-lessee's eviction.

The only words a magistrate should say in response to a question from a property owner about how to remove a mobile home from the owner's property are, "I can't give you advice about that. I suggest that you consult an attorney."

The terms of an oral lease may be proven by testimony of the parties to the lease.

The terms of a written lease may be proven only by the written lease itself.

A magistrate should always check a written lease for a forfeiture clause.

If a lease contains a forfeiture clause, the rights of the parties are governed by whatever the lease says.

Summary ejectment for failure to pay rent is available only if the lease does not contain a forfeiture clause.

Summary ejectment for failure to pay rent requires that a landlord provide evidence that a demand was made for rent, and that the complaint was filed at least 10 days after demand was made.

The law requires the owner of a mobile home lot to provide a tenant having a mobile home on the lot with at least 60 days notice before terminating the lease.

The sixty-day rule used to be a thirty-day rule, but the General Assembly changed the law to allow more time.

The sixty-day rule applies only to summary ejectment actions based on holding over (i.e.," The lease is ended and the tenant's still there.") If ejectment is based on another ground, the sixty-day rule has no application.

Thanks for coming along on this journey through summary ejectment as seen through the window of a mobile home. Three pretty simple questions, three fairly complex legal areas—just another example of Big Law!

Big Law: The SE Judgment Form, Part 1

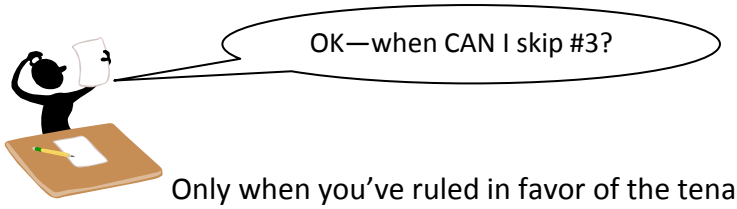
This post is the first in a series responding to questions that sometimes come up about the judgment form in actions for summary ejectment. Today, I'm focusing on #3 under FINDINGS (which I'm going to call "#3" for the rest of this post). [1] It looks like this:

3. ☐ a. there is no dispute as to the amount of rent in arrears, and the amount is $ _____ .
   ☐ b. there is an actual dispute as to the amount of rent in arrears. The defendant(s) claims the amount of rent in arrears is $ _____, and this amount is the undisputed amount of rent in arrears.

Confusion Worse Confounded

Question:	What does #3 have to do with the amount of rent I award?
Answer:	Nothing at all.
Response:	Well, THAT certainly clears things up. . . .

It's important to understand that what you write on the form for #3 is unrelated to the amount of back-rent the plaintiff wants or the magistrate awards; these amounts may be the same, or they may be completely different. Because #3 is not actually part of what the court is ordering, some magistrates routinely ignore it as unnecessary surplusage. But that's a mistake. You should fill out #3 in the "regular" case in which the plaintiff seeks possession and a money judgment and you find in plaintiff's favor. And you should also fill out #3 in when plaintiff wins possession in a case served by posting. What if the landlord asks for back rent and possession, and you ruled against him on his claim for money, awarding possession only? Fill out #3. What if the plaintiff isn't even asking for money damages? Fill out #3.



Only when you've ruled in favor of the tenant. As we shall see, when there's no possibility of an appeal by the tenant, #3 is unnecessary surplusage, and you can cruise right on by.

[1] Don't you love the law? Only lawyers could come up with a form that says there's a dispute about the amount followed by a blank labeled "undisputed amount"!

Why It's Important:

The clerk is first on the list of people you'll help by filling out #3, because s/he needs this information to do his or her job. It's a good idea for you to understand why this is true, so that you are able to do your job of providing citizens with accurate information about small claims procedure.

Citizen-Defendant:	*Do I have to get out right away?*
Mighty Magistrate:	*You have 10 days to decide whether you want to appeal my decision for another trial, next time in district court. After 10 days, the plaintiff has the right to have the sheriff put you out.*
Citizen-Defendant:	*If I appeal, do I still have to get out after 10 days?*
Mighty Magistrate:	*Not necessarily. There's a procedure for "staying"—delaying—the judgment and you can see the clerk for details if you want to do that. Usually, the procedure requires that you* ***pay the clerk the amount of rent you both agree is due . . . .***

There it is: the amount of "undisputed rent" is the amount that the landlord claims is due and the tenant does not contest. It's important because this is the amount, for starters, that the tenant must come up with in order to remain on the rental property while the appeal is pending. The tenant also must pay future rent, as it comes due, into the clerk's office while the case is on appeal. Requiring the tenant to make these payments is an effort to minimize the harm to the landlord caused by the tenant remaining on the property while the parties wait for the district court trial.

But the law does not require the tenant to come up with any amount the landlord demands, regardless of how unreasonable it might be. G.S. 42-34(b) directs a magistrate to determine the amount of undisputed rent due. A tenant claiming payment to the landlord, or seeking rent abatement due to violation of the Residential Rental Agreements Act, will be required to pay only that amount s/he agrees is owed in order to stay the judgment (in addition to paying rent as it comes due, of course). The amount actually due will be determined at the de novo trial in district court, and the clerk will disburse the funds being held as directed by the district court judge. If the funds held by the clerk are insufficient, the landlord will of course have the usual option of seeking to execute on his judgment for the balance due.

Determining how to fill out FINDING #3 is usually pretty simple. Most of the questions that come up involve cases in which the defendant, for one reason or another, has not been heard from at all. The General Assembly anticipated that problem, making it clear that an amount becomes "disputed" only when a tenant appears at trial to dispute it. You can test your understanding by considering the following four scenarios. In each case, ask yourself whether you would check Box 3(a), 3(b), or no box at all, as well as the amount you'd write in the blank on this part of the judgment form.

Scenario 1: Larry Landlord files an action for possession of commercial property. He contends that Tammy Tenant Inc. owes $40,000 in back rent, but obviously Larry is asking for only possession in your court. He'll file a Superior Court action for

the money. Tammy Tenant Inc. contends that a proper interpretation of the lease reveals that the company owes only $20,000.

☐ 3(a) $_____ ☐3(b) $_____ ___ No box at all.

Scenario 2: Larry Landlord files an action for possession of commercial property. He contends that Tammy Tenant Inc. owes $40,000 in back rent, but Larry is in small claims court seeking possession only. Tammy Tenant Inc. was served, but does not appear at trial.

☐ 3(a) $_____ ☐3(b) $_____ ___ No box at all.

Scenario 3: Luke Landlord files a summary ejectment action seeking possession, back rent of $4,000, and $1,000 damage to property. Tonya Tenant appears and denies that she owes Luke any money at all. You believe Luke's evidence.

☐ 3(a) $_____ ☐3(b) $_____ ___ No box at all.

Scenario 4: Luke Landlord files a summary ejectment action seeking possession, back rent of $4,000, and $1,000 damage to property. Service is by posting, and Tonya Tenant does not appear at trial.

☐ 3(a) $_____ ☐3(b) $_____ ___ No box at all.

(See Answers, last page.)

Potential Problem: When a plaintiff is seeking only possession of rental property, plaintiff's testimony sometimes does not include information about the amount of rent in arrears. After all, that is not an issue in the case, and so a plaintiff might understandably omit that information. Absent such testimony, how can a magistrate complete #3? The statute provides two acceptable answers. First, the magistrate can simply ask the plaintiff—and the defendant, if the defendant is present—what rent, if any, is in arrears. Secondly, the law permits a magistrate to rely on allegations made in the complaint (assuming the defendant does not appear and dispute that amount). In either event, it is important to remember that the magistrate is not making a judicial determination of the amount actually owed by the defendant, but is instead merely recording the parties' contentions about the amount.

Back to our small claims case:

Citizen-Defendant: *If I appeal, do I still have to get out after 10 days?*

Mighty Magistrate: *Not necessarily. There's a procedure for "staying"—delaying—the judgment and you can see the clerk for details if you want to do that. Usually, the procedure requires that you pay the clerk the amount of rent you both agree is due . . . .*

Citizen-Defendant: *But I owe $4,000! I can't come up with all of that money right away. I don't HAVE any money—if I did, I would pay my rent!*

Mighty Magistrate: *If you are indigent, you are not required to pay all of the rent in arrears in order to remain on the property while the appeal is pending. You will be required to pay rent into the clerk's office each month as it comes due, however, and you may be required to make a payment for the rent for the rest of this month. If you decide to appeal and want to remain on the property until your appeal is decided, you should talk with the clerk about whether you qualify as an indigent for the purpose of the bond required to stay my judgment.*

A Little Something Extra:

I'm going to close with a different answer to the tenant's question. This answer combines a variety of responses to the tenant's indication that she might be indigent. It might be interesting to ask yourself whether you've ever said any of these things—or all of these things! While I respectfully argue that these comments should be avoided, that's just my opinion, and there are many magistrates who take a contrary position. What's your opinion? I'll include responses—without identifying information—in the next post.

Mighty Magistrate: Well, if you admit you owe the rent, what are you appealing for? If you're just appealing so that you can stay on the property, you're not supposed to do that anyway. You expect Mr. Landlord here to just let you live there rent-free? He has to make a living too, you know. If you can come up with what you owe, that's one thing, but if you can't pay the bond to stay while you appeal, you'd be better off just going ahead and moving out. If you need more time, maybe Mr. Landlord will work with you here—I don't know. Otherwise, you're going to have to either come up with what you owe, or move.

Here's my argument for why you should resist the impulse to say something like this, however tempting it may be: Your most important responsibility is to offer citizens a *neutral* and *detached* forum for resolving their disputes. Even though the magistrate has entered judgment and the case is over, a magistrate who abandons the appearance of neutrality at this point leaves everyone in the courtroom with the impression that s/he wasn't really neutral to begin with.

A second argument relates to the important and complex topic of how to respond appropriately to questions from litigants about procedure—including how to appeal. Because that topic could easily be the subject of a Big Law post in its own right, I'm going to save it for another day. Let me just state my opinion, though, that it is improper to respond to questions from either party with non-responsive statements amounting to lecturing about what the magistrate believes is proper or improper behavior. (In other words, a party who asks how to appeal should not receive an answer containing the words "pond scum." ☺) That's my argument. Let me know what you think.

I hope this issue of Big Law is helpful to you in correctly completing FINDINGS #3 on the Summary Ejectment Judgment Form, and in responding appropriately to defendants who ask for information about the procedure. In the next issue, we'll continue our discussion of some of the challenging portions of this judgment form. If you have questions or comments, either about this post or in anticipation of the next, please feel free to send them to me—they are enthusiastically welcomed!

(Answers to Scenarios)

Scenario 1: Larry Landlord files an action for possession of commercial property. He contends that Tammy Tenant Inc. owes $40,000 in back rent, but obviously Larry is asking for only possession in your court. He'll file a Superior Court action for the money. Tammy Tenant Inc. contends that a proper interpretation of the lease reveals that the company owes only $20,000.

☐ 3(a) $_____ ☑3(b) $20,000 ___ No box at all.

Scenario 2: Larry Landlord files an action for possession of commercial property. He contends that Tammy Tenant Inc. owes $40,000 in back rent, but Larry is in small claims court seeking possession only. Tammy Tenant Inc. was served, but does not appear at trial.

☑ 3(a) $4,000 ☐3(b) $_____ ___ No box at all.

Scenario 3: Luke Landlord files a summary ejectment action seeking possession, back rent of $4,000, and $1,000 damage to property. Tonya Tenant appears and denies that she owes Luke any money at all. You believe Luke's evidence.

☐ 3(a) $_____ ☑3(b) $0 ___ No box at all.

Scenario 4: Luke Landlord files a summary ejectment action seeking possession, back rent of $4,000, and $1,000 damage to property. Service is by posting, and Tonya Tenant does not appear at trial.

☑ 3(a) $4,000 ☐3(b) $_____ ___ No box at all.

Motor Vehicle Liens

A Quick Reference Guide for North Carolina Magistrates

Dona Lewandowski

Institute of Government

University of North Carolina at Chapel Hill

Who is suing, and what does he want?

1. Action by lienor to establish lien.

2. Action by owner to recover MV and establish lien, if any.

3. Action by lienor to recover MV and establish lien.

For each action, consider:

-- Service of process (page 6)

-- Cash bonds (page 7)

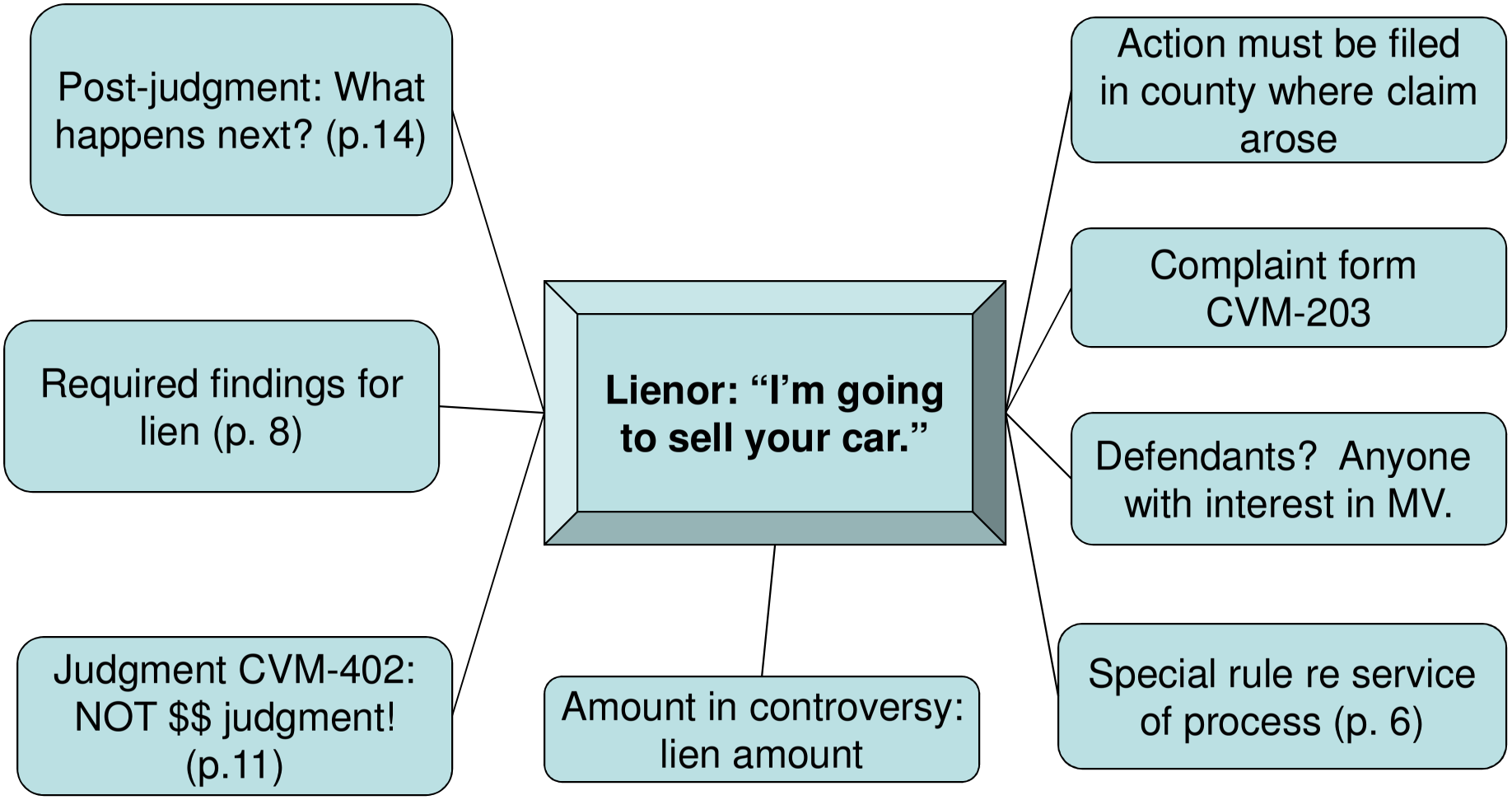
-- Required findings (page 8)

-- Special rules for storage fees (page 10)

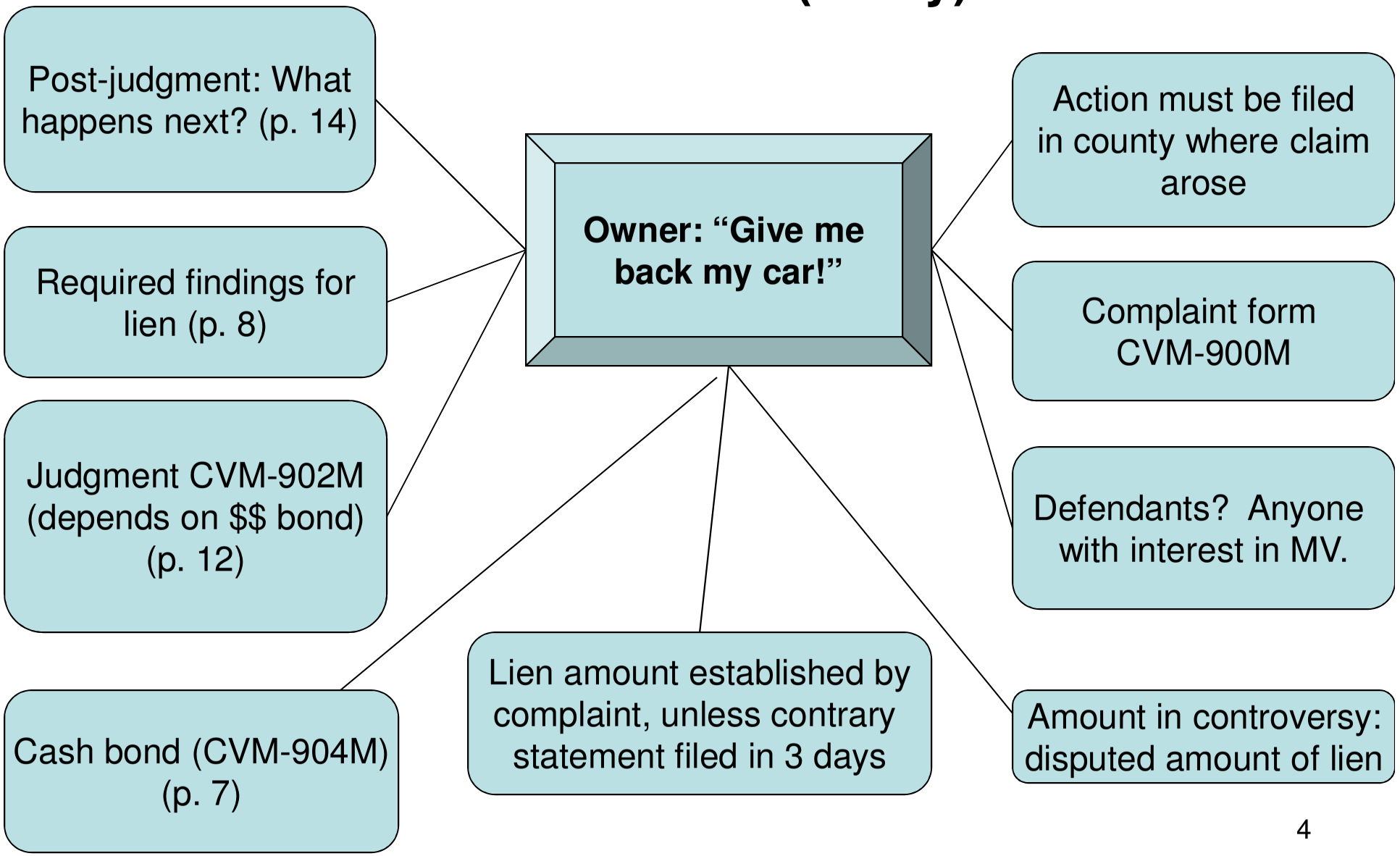
-- Judgment (pages11-13)

-- What happens next (page 14)

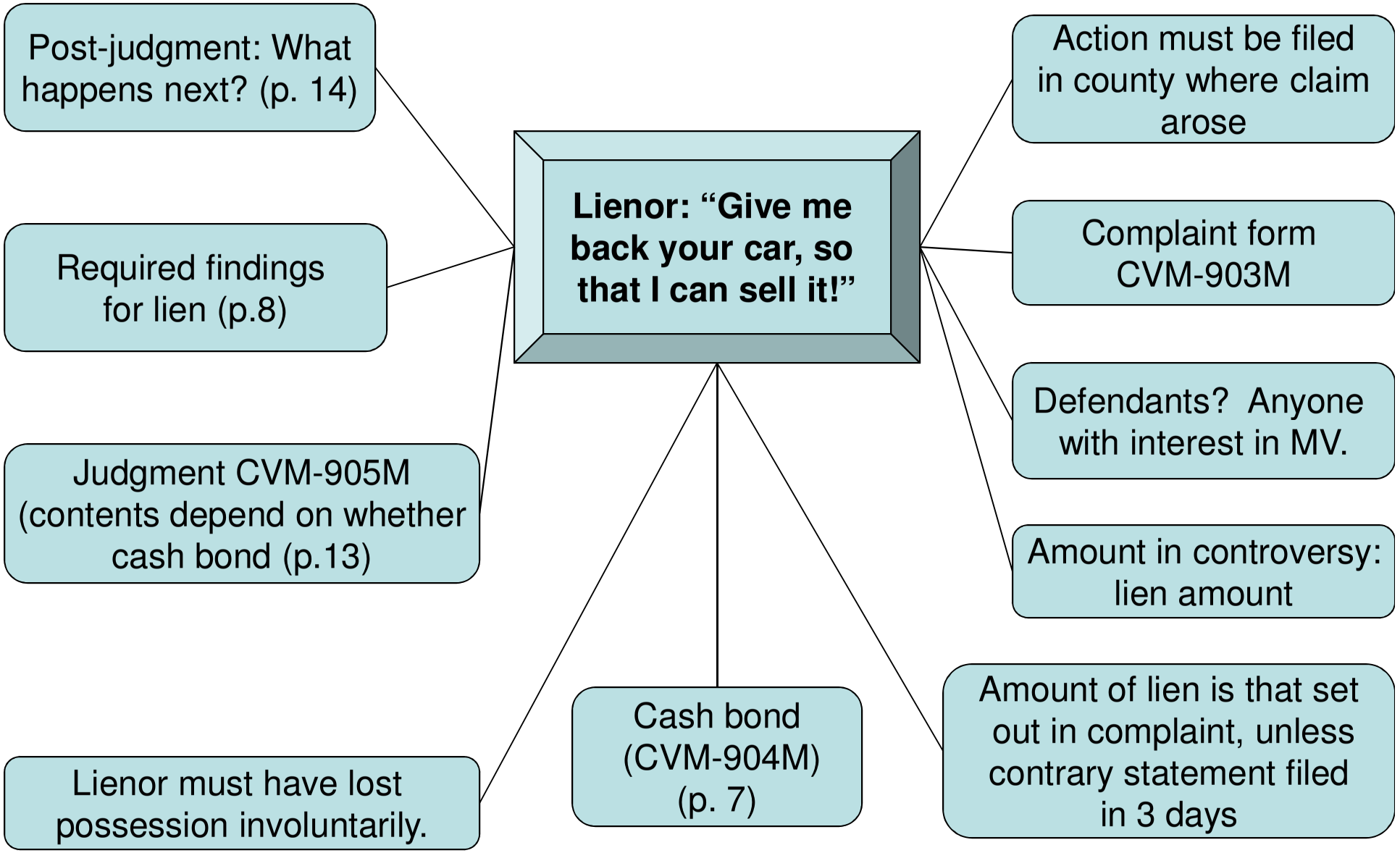
1. Action by lienor to establish lien:



2. Action by owner to recover MV and establish amount of lien (if any):



3. Action by lienor for MV and to establish lien:



Special rule for service of process

If service by usual methods is not possible, lienor may use service by publication.

Must be:

--published once/week for 3 weeks in a row

--in a qualified newspaper commonly sold in county where action pending

--with published notice containing specific contents

Service by publication may be proven by affidavit.

Cash bonds to recover motor vehicle

- Amount determined by complaint, or by contrary statement if filed w/in 3 days of service.
- Owner pays clerk full amount claimed in cash.
- Clerk issues CVM-901M, ordering release of motor vehicle.
- Bond eventually distributed based on judgment.

To establish lien, must show:

5. Charges are reasonable, or if not, amount of reasonable charges.

4. Charges have not been paid.

3. Has possession of motor vehicle.

2. Had contract with owner or legal possessor.

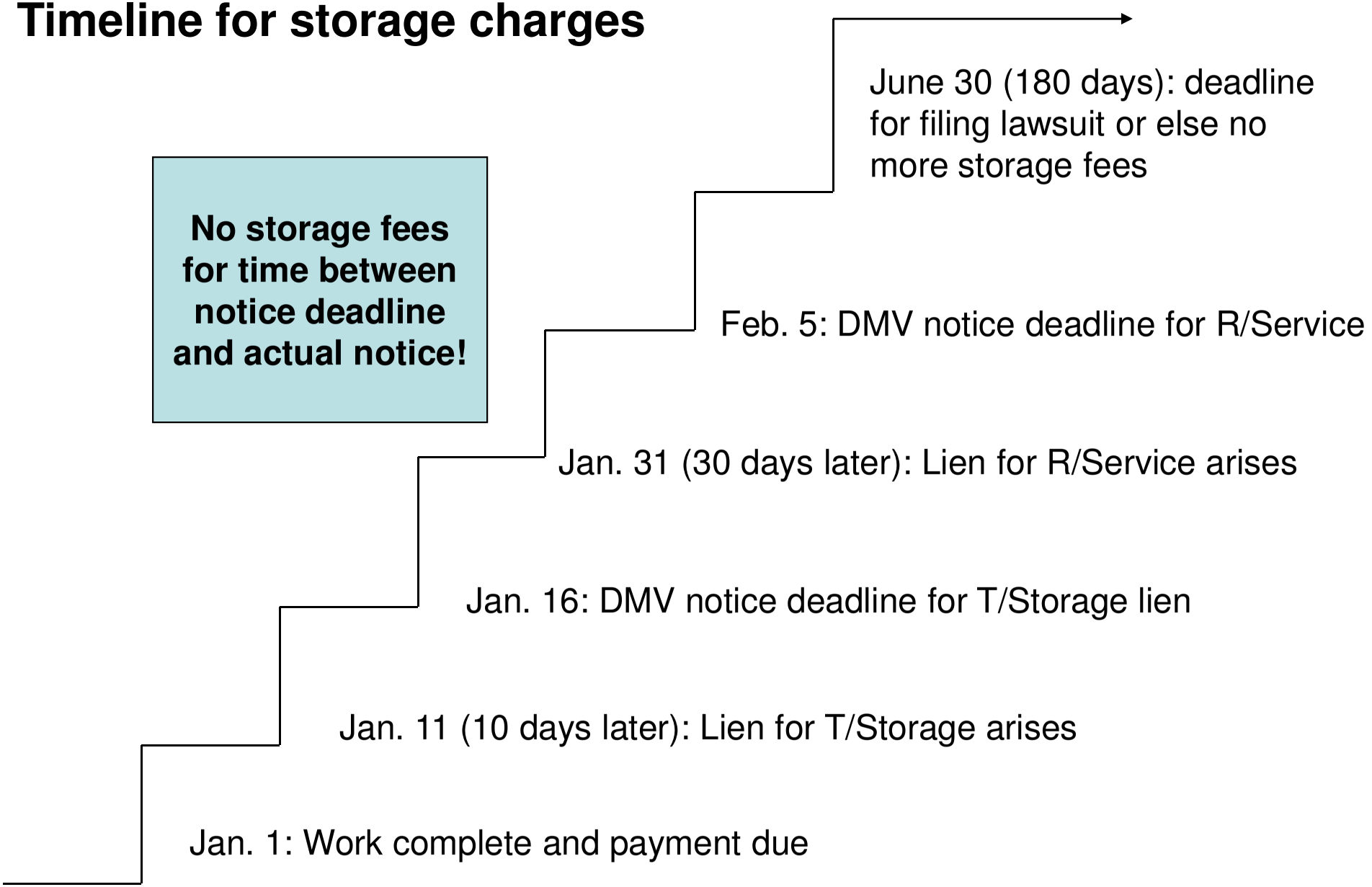
1. Repairs, services, tows, or stores MV in OCB .

Two less common kinds of liens:

- A person in the business of parking or garaging cars for the public has a lien arising when the vehicle has been unclaimed for 10 days; and

- A landowner has a lien arising when a MV has remained abandoned on his land for 30 days. NOTE: this lien is not available to a landlord in connection to property belonging to a tenant.

Timeline for storage charges



Judgment in action by lienor to establish lien (CVM-402)

- Authorizes lien and establishes its amount. NOT a money judgment.
- Lien is for reasonable value of services provided.
- Note special rule for storage charges (see page 10).

Judgment When Owner Seeks Possession of MV: CVM-902M

No Cash Bond	Cash Bond
No Lien: Owner gets possession, no lien for lienor	**No Lien:** Owner gets possession, and judgment orders clerk to disburse $ to owner
Lien: Lienor gets possession, and can assert lien <u>for amt determined by magistrate</u>	**Lien:** Owner gets possession; judgment orders clerk to disburse <u>$ to lienor in amount ordered by magistrate.</u> (owner gets anything left over).
Owner fails to appear: Case dismissed. Lienor keeps possession and asserts lien as law allows	**Owner fails to appear:** Case dismissed. Magistrate directs clerk to disburse $ to lienor. (Owner already has vehicle.)

Judgment When Lienor Wants MV Back and to Assert Lien: CVM-905M

No Cash Bond

Lien: Lienor gets possession, and can assert lien <u>for amt determined by magistrate</u>

No Lien: Owner keeps possession, no lien for lienor.

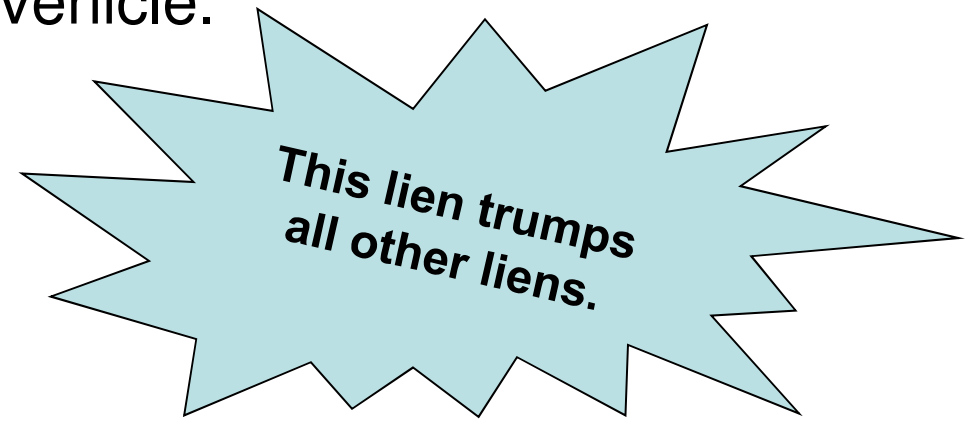
Cash Bond

Lien: Judgment orders clerk to disburse <u>$ to lienor in amount ordered by magistrate.</u> (Owner gets anything left over.)

No Lien: Action is dismissed, and judgment orders clerk to disburse $ to owner (who also keeps vehicle).

What happens next:

1. Lienor sends copy of judgment to DMV.
2. DMV authorizes sale.
3. Sale may be private or public, but must follow rules of statute.
4. Proceeds are distributed in this order: (1) expenses of sale, (2) lienor, (3) other lienors, and (4) owner of vehicle.



Details, Details, Details. . .

Companion to "Motor Vehicle Liens: A Quick Reference Guide for North Carolina Magistrates"

Dona Lewandowski, Institute of Government, UNC-at-Chapel Hill, 2/2007

Stage 1: Before the Hearing

A lien begins when a lienor acquires possession of the vehicle (it's called a possessory lien), and it ends when the lienor voluntarily gives up possession, or when the lienor is paid the full amount owed. No written lien is filed with the Division of Motor Vehicles (DMV) or with the clerk.

A lien terminates if the lienor loses possession. This loss of possession must be with the lienor's consent, however, or because of a judge's order. If the lienor loses possession because the vehicle is taken without his consent, the lien continues to exist. On the other hand, if the lienor lets the debtor take the vehicle because he agrees to pay what he owes, the lien ends. Even if the debtor does not pay, or brings the vehicle back for additional work, the lien is not revived. The former lienholder will have to bring a contract action to recover his charges (although he may assert a new lien if the debtor once again refuses to pay for the new work done).

Payment also ends a lien. Payment may be made by owner, secured party, or legal possessor, and it must be for full amount secured by the lien (NOTE: this is contract amount, not reasonable value) plus reasonable storage fees.

First Steps in Enforcement

The first step a lienor must take to enforce his lien is to file an unclaimed vehicle report with DMV (DMV form ENF-260, Rev. 4/98). When this report may be filed depends upon the location of the vehicle. If the vehicle has been unclaimed in a place of business, the report may be filed after 10 days. If the vehicle has been abandoned on a landowner's property, the report may be filed after 30 days. In either case, failure to file this notice within five days after the appropriate date limits the amount of storage charges the lienor can charge. After the five days have passed, if the lienor hasn't notified DMV that he has the vehicle, he can't charge for storage until he DOES notify DMV.

Example: David Debtor takes his car to Eddie's Garage, but can't pay Eddie's bill. Eddie waits ten days (until March 10), as is required, but gets distracted by ACC basketball and forgets to notify DMV that he has the car for 2 months. He remembers and sends in the form on

May 10. Eddie cannot collect storage for the period between March 15 (5 days after the ten-day period is up) and May 15.

The second step a lienor must take to enforce a lien is to file a notice of intent to sell the vehicle. This notice too is filed with DMV (DMV form ENF-262, Rev. 4/98). There are special rules regulating when notice may be filed: If the only charges are for towing and storage, the lienor may file this notice when the charges have been unpaid for 10 days. The result is that this notice sometimes may be filed simultaneously with the report to DMV that a vehicle is unclaimed. In all other cases, the lienor must wait to file this notice until charges have been unpaid for 30 days.

DMV takes the next step: When DMV receives notice that the lienor plans to sell the vehicle, it sends out a certified letter, return receipt requested, to all interested parties. Interested parties include the owner of the vehicle, any secured parties, and the person with whom the lienholder contracted, if not the owner.

Contents of notice: This notice contains the following information: name of the lienholder, nature of services performed, amount of the lien claimed, and statement of intent to sell the vehicle to satisfy the lien. This notice also informs the recipient of his or her right to request a judicial hearing to determine whether the lien is valid. If one of the recipients wants a hearing, he must ask for one within ten days by notifying DMV.

After DMV sends out this certified letter, one of three things may happen: (1) all parties receive notice and none request a hearing; (2) not all parties receive notice; or (3) one or more parties request a hearing.

(1) If all parties receive notice and none request a hearing, DMV authorizes the lienor to sell the vehicle and no court proceeding is required. This sale must be conducted according to the rules set out in G.S. 44A. (See **Stage 3,** beginning on p. 13)

(2) If one or more of the parties do not receive notice that the lienor intends to sell the vehicle (i.e., the identity of the owner or other party cannot be determined, or a certified letter is returned to DMV as undeliverable), some further proceeding is required.

If the names and addresses for all parties are known but the certified letter is returned as undeliverable, the lienor may file a special proceeding before the clerk or bring an action in small claims or district court.

If the name of the owner is unknown and the vehicle has a fair market value of less than $800, the lienor may file a special proceeding before the clerk or bring an action in small claims or district court.

Any other case involving inadequate notice must be brought in small claims or district court to establish the lien.

(3) **If any person receiving notice requests a hearing**, the lienor must bring an action in small claims or district court.

Stage 2: The Hearing

Procedure for hearings

Magistrates may hear actions to enforce motor vehicle liens if assigned to do so by the chief district court judge.

Note: These actions **must be filed in county in which claim arose**, not county of defendant's residence.

The **amount in controversy** is the amount of the lien, not the value of the motor vehicle.

Any person with an interest in the motor vehicle should be made a party to this action. This always includes the owner and secured parties. An unknown owner may be sued using description of vehicle. For example, the action may be brought against "unknown owner of white Pontiac Grand Prix, VIN #64532339866678."

Secured parties have an interest in these actions because motor vehicle liens "beat" all other liens. As a result, sale of the motor vehicle will destroy the secured party's lien. The secured party is entitled to any surplus after the expenses of sale and the amount of

the motor vehicle lien are subtracted from the sale price. In some cases, however, the secured party may wish to protect its interests by paying off the lien amount.

Service of process

If the defendant is known, the same methods of service apply as usual in small claims cases, with one exception: if the defendant cannot be served by usual methods using "due diligence", service by publication is allowed.

If the defendant is unknown, he is designated by description (see example above, on preceding page) and is served by publication.

There are special rules for service by publication:
-Publication must be in the county where the action is pending.
-Publication must be in a newspaper qualified for legal advertising and circulated in the county where action is pending.
-Publication must occur once a week for 3 successive weeks.

The publication must contain the following information:

- ✓ Court in which action is filed.
- ✓ Must be directed to defendant sought to be served;
- ✓ Must state that a pleading has been filed seeking relief;
- ✓ State the nature of the relief being sought;
- ✓ Require defendant to make defense within 40 days after date stated in notice (i.e., date of first publication);
- ✓ State that failure to respond will result in plaintiff seeking requested relief;
- ✓ Must be subscribed by plaintiff and give his address.

Statutory form for published notice (G.S. 1A-1, Rule 4(j1):
NOTICE OF SERVICE OF PROCESS BY PUBLICATION
STATE OF NORTH CAROLINA _____ COUNTY
In the _____ Court
Title of action
To (Person to Be Served):

Take notice that a pleading seeking relief against you has been filed in the above-entitled action. The nature of the relief being sought in as follows: (State nature.)

You are required to make defense to such pleading not later than (_____ , ____) and upon your failure to do so the party seeking service against you will apply to the court for the relief sought.

This, the _____ day of _____ , _____.

_____(Party)_

_____(Address)

Proof of service by publication: Plaintiff must file two affidavits with the clerk (to be filed in shuck), one explaining why service by publication was required, and the other an affidavit from the publisher of the newspaper showing notice and specifying the first and last dates of publication.

Three kinds of actions (and three kinds of liens)

In the typical case, a lienor appears in small claims court **seeking to establish a motor vehicle lien**. To "win," he must prove two things: that a valid lien exists, and the amount of the lien. The **proof required to demonstrate that a valid lien exists depends on the type of lien involved**, and the first thing a magistrate must do (after checking service of process) is determine what kind of lien is asserted. There are three possibilities:

1) A lien under G.S. 44A-2(d) (sometimes referred to in this material as "**RSTS in OCB**"). This lien is available to persons or businesses who repair, service, tow, or store motor vehicles in the ordinary course of business.

2) A lien under G.S. 20-77(d) (sometimes referred to in this material as "**GRPS for public**"). This lien is available to persons or businesses, who garage, repair, park, or store motor vehicles for the public.

3) A lien asserted by a **landowner** because of an abandoned motor vehicle on his property

Each lien has different elements and requires different evidence. A **lienor who claims to have the lien listed first above ("RSTS in OCB")** must show that he or she repairs, services, tows, or stores motor vehicles in the ordinary course of business. (NOTE: This lien is not available to a person who works on cars as a hobby, or as a favor, for example.) The lienor must also demonstrate that he entered into an express or implied contract for one of these services with the owner or legal possessor of the vehicle. A vehicle's "owner" may be

the person with legal title or his agent, a lessee, a secured party, or a debtor entrusted with possession of the vehicle by a secured party. A legal possessor includes anyone in possession with permission of owner, or entitled to possession by operation of law (for example, a law enforcement officer who acts with statutory authority to have a vehicle towed). The rest of what the lienor must show is simple: that the vehicle is in her possession, that proper notice has been given to DMV, and that the charges for services remain unpaid. Finally, the lienor must introduce evidence in support of the amount of the requested lien: what services were performed, the reasonable cost of these services, and the amount and justification for the additional expense of storage.

What if the lienor claims a lien under G.S. 20-77(d) ("GRPS for public")? The showing he must make is (only slightly) different. This lienor must show that he operates a business garaging, repairing, parking, or storing vehicles "for the public". Additional requirements for the establishment of this sort of lien are that the vehicle has remained unclaimed at the establishment for ten days, that an unclaimed vehicle report was properly filed with DMV, that the lienor has possession, and that the charges have been unpaid. This lien overlaps significantly with that discussed above, and a lienor who has provided repair services will typically use that lien. The G.S. 20-77(d) lien and is most often asserted when the lienor is a parking deck or similar business. Again, the lienor must also support his claim of lien in a particular amount by introducing evidence of reasonable charges for the services provided.

What if the lienor is asserting a landowner's lien? The proof for this lien is very straightforward. The lienor must show only that he is the owner of land on which the motor vehicle in question has been abandoned for at least 30 days, and that a proper report has been made to DMV. The amount of the lien is established by evidence of reasonable storage charges. Note that this lien is improperly used by a landlord seeking to recover damages arising out of a rental agreement; the correct lien in that case is a landlord's lien under G.S. _____.

Speaking of Storage . . .

Storage is a special category of damages because of the danger that unscrupulous plaintiffs might allow a vehicle to remain on their premises for long periods of time in order to pile up charges for storage. To discourage this practice, two special rules apply to this particular item of damages:

Delayed Notice to DMV: Remember that lienors must notify DMV that they are in possession of an unclaimed vehicle after ten days have passed (30 for a landowner lien), and that they have five days to do so. Failure to make timely notification to DMV bars the lienor from asserting storage charges for the period from the fifteenth (or 35th, as the case may be) day of the lien to whenever DMV is properly notified. Note that late notification carries with it the additional requirement that the lienor must use certified mail.

Delay in Filing Action to Enforce the Lien: A lienor must file an action to enforce the lien within 180 days after storage begins or else forfeit the right to collect storage for the period after 180 days.

Note Different Rule in Express Contract for Storage: In a case in which storage is the service contracted for, it makes no sense to start the clock when storage begins. (In a one-year storage contract under this rule, the lienor would lose the right to assert a lien for storage fees halfway through the contract period!) In these cases, the clock begins to run from date of default, and the action must be brought within 120 days thereafter.

If the magistrate determines that a valid lien exists (regardless of which type of lien it is) and determines the reasonable value of the services provided and storage costs, the next step is to enter judgment authorizing the lienor to enforce the lien and specifying the monetary amount of the lien. Note that this is not a money judgment, despite the fact that the magistrate must determine the amount of the lien. This judgment is, instead, a judicial determination that the lienor has a lien. This determination clears the way for DMV to authorize the lienor to go ahead with the sale, so that he may collect the amount of the lien. In this action to establish a lien, the appropriate AOC form for judgment is CVM-402.

The second kind of action occurs when the vehicle's owner wants his car back. These cases, obviously, do not involve abandoned vehicles and unknown owners, at least not by the time they get to small claims court. Instead, these cases arise when a lienor refuses to hand over a vehicle because of unpaid charges, and the vehicle owner (or other person with an interest in the vehicle) responds by suing to recover his vehicle. In doing so, the owner will necessarily be attacking the validity and/or amount of the lien. As a result, the legal issues that the magistrate must determine are all but identical to those discussed above, even though the parties have switched places.

The owner institutes this action by filing a complaint (CVM-900M), and the procedure follows that of any other small claims case. At trial, the owner has the burden of demonstrating by the greater weight of the evidence that (1) the vehicle is not subject to a valid lien, or (2) that the amount of the lien differs from that asserted by the defendant. As to the first, the magistrate must first determine which kind of lien is at issue, so that s/he may identify the essential elements that apply. In order to defeat the defendant's contention that he holds the vehicle by authority of a lien, the plaintiff must offer evidence negating at least one of these essential elements.

Sometimes the plaintiff more or less concedes the fact that a lien exists but challenges the amount asserted by the lienor. In making this determination, there are two important factors for the magistrate to remember: **First, the amount of the lien is for the reasonable value of services provided, combined with storage.** This amount may or may not be the same as the contract amount, although evidence of the amount agreed to by the parties may be relevant in determining what charges are reasonable. **Second, the amount of the lien is established by the amount set out in the complaint,**

unless the lienor files a contrary statement within three days of being served.

The amount of lien eventually ascertained by the magistrate may be affected by several legal principles related to the rules set out above. As to "reasonable expenses" of storage, the limitations discussed on p. 8 may operate to decrease the amount a lienor may eventually recover. Also, the rule giving the lienor only three days after service of summons to file a written contest of the amount of lien set out in the complaint requires an unusually rapid response and may catch defendants by surprise. Note that in applying the three-day rule, G.S.1A-1, Rule 6(a) provides that the day the complaint is served is not counted; neither are intervening Saturdays, Sundays, and holidays.

One issue that arises sometimes in disputes about the cost of servicing or repairing motor vehicles involves the **requirement that providers of these services furnish customers with a written estimate. The Motor Vehicle Repair Act** (G.S. 20-354 – 354.9) contains a number of provisions that at first blush appear to be important in resolving cases involving motor vehicle liens. The Act applies to repair and related services involving charges of $350 or more and establishes a right to sue for damages for violation of its provisions. The Act requires covered businesses to furnish a written estimate in advance of providing services, and it prohibits substantial deviation from the estimate as well as a number of other fraudulent or deceptive practices. In addition, the Act prohibits service providers from retaining possession of a vehicle because of unpaid charges when certain conditions are met.

The scope of the Motor Vehicle Repair Act is not as far-reaching as it first appears, however. First, while the Act addresses the situation in which the final bill is significantly higher than the initial estimate (prohibiting the service provider from retaining possession of the vehicle in these cases), it does not apply to the common situation in which no estimate is provided at all. Second, the right to damages caused by a violation of the Act makes little sense in a motor vehicle lien case, in which the amount of the lien is based on the reasonable value of services actually received. In such a case, the plaintiff will have a difficult time indeed showing actual damages caused by the lack of a written estimate. While a magistrate may well be presented with important cases growing out of violations of the Motor Vehicle Repair Act, particularly those involving allegations of unfair trade

practices, it is more likely to be a red herring in motor vehicle lien cases.

"I want my car back!"

Cash bonds to the rescue

When a car owner wants to regain immediately possession of the vehicle, he may deposit with the clerk cash equal to the full amount of the lien alleged by the lienor. The clerk will then issue an Order for the Release of Property Held for Lien (CVM-901M), directing the lienor to release the vehicle to the owner. This remedy is available in any case in which a lienholder retains possession of a motor vehicle under claim of lien and is enforceable by the contempt power of the court.

One issue sometimes arises when an owner files a complaint and cash bond at the same time, and the clerk immediately issues an order for release after accepting cash in the amount specified in the complaint. Remember that the law provides the lienor with a three-day period in which to challenge the amount set out in the complaint. Often, the complaint will set out the amount allegedly due for repairs or other services but will not include the additional amount the lienor seeks for storage. The better practice would be for the clerk to delay accepting the cash bond until the lienor has had opportunity to specify the amount of the asserted lien.

The presence or absence of a cash bond has significant effect on the magistrate's judgment, as discussed below.

Entering judgment in actions by the owner to recover possession of a motor vehicle: At the conclusion of the hearing, the magistrate enters judgment on form CVM-902M. The details of the judgment depend on whether the plaintiff has deposited a cash bond.

In cases in which plaintiff has not deposited a cash bond, remember that the lienor has the vehicle and wants to sell it in order to get the money he claims to be owed. In these cases, if the owner proves that no lien exists, the judgment will state that the plaintiff is entitled to possession of the vehicle and the defendant is not entitled to a lien. If, on the other hand, the owner fails to prove that no lien exists, the

judgment will indicate that the defendant is entitled to retain possession of the vehicle and to proceed to enforce his lien in the amount determined by the magistrate, unless the plaintiff forestalls sale by paying defendant the amount of the lien. The last possibility, of course, is that the plaintiff fails to appear, in which case the action is dismissed and the lienor is left in the same position he occupied before the action was filed: in possession of the vehicle and with the remedies accordingly available to him.

In cases in which plaintiff has deposited a cash bond: remember that in this case the plaintiff has the vehicle, and the clerk has the money. The fact that the money has been paid to the clerk has significant implications for the judgment. If the plaintiff prevails, proving that there is no lien, the judgment will indicate that he retains possession of the vehicle and direct the clerk to return the money plaintiff paid in. If the defendant prevails, and the magistrate finds that a valid lien exists, then the judgment will direct the clerk to disburse the amount of the bond based on the amount of the lien as set out in the judgment. The plaintiff, of course, is entitled to retain possession of the vehicle, in light of the fact that the lien has been satisfied. Finally, if the plaintiff fails to appear, the case must be dismissed and the magistrate will direct the clerk to disburse to the defendant the amount of the bond

The third kind of action, less common, arises when the lienholder has lost possession of the vehicle and seeks to recover possession and to enforce the lien. The special element in this case is possession. Remember that being in possession of the motor vehicle is an essential element of all three liens. What is a lienholder to do, then, if the owner or someone connected to him removes the vehicle without his permission? If his loss of possession was indeed involuntary, then the lienor must seek to regain possession in order to successfully assert his claim of a lien.

The action begins when the lienor files a complaint (CVM-903M) asking for return of the vehicle and for a determination of the amount of lien. The amount of lien set out in the complaint will be binding on the parties and the magistrate unless the defendant (generally the owner, as well as secured parties) files a contrary statement within three days of service. (See the discussion above, on pp. 9-10, of legal rules relevant to this.) At trial, the lienholder has the burden of proving the existence of one of the three types of liens by the greater weight of the evidence, as well as the amount of the lien, assuming the defendant filed a timely statement challenging the amount.

In this action, as in the others, the owner or secured parties may post a cash bond in the amount of the asserted lien and thus retain possession of the vehicle. The presence or absence of a cash bond will be reflected in the judgment eventually entered by the magistrate.

If no cash bond has been posted: If the lienholder demonstrates a valid lien, including the reasonable amount of the charges, the judgment of the magistrate will indicate his right to regain possession of the vehicle and to proceed to enforce the lien in the amount determined by the magistrate (or, if applicable, in the unchallenged amount set out in the complaint). If, on the other hand, the lienholder fails in his proof, the magistrate will enter an order of dismissal, leaving the defendant in possession of the car and preventing further enforcement of the alleged lien.

If a cash bond has been posted: If the lienholder demonstrates a valid lien, the judgment of the magistrate will direct the clerk to disburse the appropriate amount of the cash to the plaintiff and return any surplus to the defendant. (The same issue as to amount is present in this instance as above; the lien will be in the amount set out in the complaint if defendant did not challenge it, and in the amount determined by the magistrate to be reasonable if the complaint amount was challenged by the defendant). The defendant will of course retain possession of the vehicle. If the lienholder fails in his proof, the magistrate will dismiss the action and direct return of the cash bond to the defendant (who also keeps the vehicle, of course).

Stage 3: After the hearing

After filing notice of intent to sell a vehicle pursuant to a lien, and following any judicial hearing that may be required because it is requested or because of notice problems, the lienholder is ready to pursue his remedy. If no judicial hearing was required, the lienor received authorization to conduct a sale from DMV soon after the certified letters containing notice of intent to sell were sent out. If a hearing was required, the lienor must send a certified copy of the judgment to DMV, which will then authorize the lienor to proceed with sale. In either case, the next hurdle for the lienor is to conduct the sale of the motor vehicle in a lawful manner.

The first decision confronting the lienor at this point is whether to hold a private sale or a public sale. The rules for both are set out in G.S. 44A-4, and won't be set out here in detail. The general provisions are as follows:

Public sale

- ✓ A public sale is required on request of any person with an interest in the property.
- ✓ Notice of sale must be sent to DMV and all interested parties at least 20 days beforehand, posted at courthouse door, and published in newspaper (unless vehicle is worth less than $3,500).
- ✓ Notice must specify a number of things, including the date, time, and location of the sale.
- ✓ The sale must be held between 10:00 AM and 4:00 PM, on a day other than Sunday.
- ✓ The lienor is allowed to purchase the property at a public sale (and only at a public sale).

Private sale

- ✓ Private sale must be conducted in "commercially reasonable" manner.
- ✓ Notice of intended sale must be given to DMV at least 20 days beforehand.
- ✓ Notice of intended sale, containing specified information including date, time, and place of sale, must be provided to owner and other interested parties at least 30 days beforehand. (This notice may be combined with initial notice of intent to sale setting out 10-day period for responding and challenging lien.)
- ✓ Private sale is not allowed if any interested party objects, asks for public sale.
- ✓ Lienor may not purchase "directly or indirectly" at private sale, and any such attempted purchase is voidable.

Damages for violation of statute

If a lienor fails substantially to follow the statutory rules for sale of a motor vehicle subject to lien, he is liable to the owner (or any other injured person) for $100, reasonable attorney fees, and any actual damages (defined as difference between fair market value of vehicle at time and place of sale and actual sale amount).

After the sale

The proceeds of sale are applied first to expenses of sale (including reasonable storage fees for period following notice of sale), and then to satisfaction of the lien, with any surplus going to "the person entitled thereto" (i.e., other lienholders, and finally to the debtor). Any purchaser for value at a properly conducted sale takes the property free and clear of any other claims or liens. The same rule applies to a purchaser who buys at a sale that was not properly conducted, assuming that the purchaser had no knowledge (or reasonable way of knowing) of the defect. These rules apply even if the purchaser is the lienor.

Dona Lewandowski
School of Government
3/5/07

Legal Issues Involving Mobile Homes

Summary ejectment from mobile home space:

When summary ejectment is based on holding over,

and the landlord's claim is that he gave the tenant notice that he intended to end the lease of a mobile home space, that notice must be given 60 days before the end of the rental. G.S. 42-14.

Example: Jones rents a space from Smith for his mobile home. Jones pays rent on the first of every month. To end the lease on April 30, Smith must give Jones notice that the lease will end no later than March 1. This is true whether the lease is a week-to-week or month-to-month lease. The special rule is merely a recognition that a tenant needs more time to relocate a mobile home than he does to move his belongings from one house to another.

Note: The 60-day rule does not apply if the eviction is for breach of a lease condition or failure to pay rent. Furthermore, if the lease contains a different provision about how the lease is to be terminated, the terms of the lease control. Finally, the 60-day rule does not apply to the time the tenant has to move out after judgment is entered.

When a landlord intends to convert a mobile home community to another use, 180 days notice is required.

The 60-day rule goes out the window when the owner of a mobile home park decides not to evict a single tenant, but instead to close an entire community of mobile homes. G.S. 42-14.3 deals with the situation in which the owner of a mobile home park (designed for at least five homes) decides to put the land to a different use that will require relocation of the mobile homes. The statute says that the landlord must give owners of the homes at least 180 days notice (not

60) before requiring them to vacate. The statute does not apply if the park is closing due to a governmental order. If the landlord fails to give the required notice, this failure is a defense against any action he may bring seeking possession. The statute provides that the respective rights and obligations of the landlord and tenants under the lease continue during the notice period. Thus if a tenant, upon receiving notice that the park is closing, stops paying rent, the landlord will be able to seek immediate eviction for failure to pay rent, or perhaps breach of a lease condition. The 180-day notice provision limits only the landlord's ability to terminate the lease and then seek ejectment based on holding over.

This statute contains two provisions that are unclear. First, the statute applies only if the landlord intends to convert the land "to another use." If the landlord intends merely to close the park, does this change from being a mobile home park to being land left idle constitute "another use"? No case has discussed the question thus far. Second, the statute does not directly address the question of whether a tenant may sue for damages arising out of a landlord's failure to comply with the notice provision. A North Carolina appellate court may well hold that the statute's statement that this failure may be used as a defense to ejectment, with no mention of the tenant's right to seek damages as well, implies that the statute may be used only defensively, but this remains uncertain.

The tenant is not the owner of the mobile home. When a landlord seeks to evict a tenant from a mobile home lot, questions sometimes arise about the significance of the identity of the owner of the mobile home. As a general rule, it makes little difference, since the law regards the mobile home just like other personal property brought on the lot by the tenant. Nevertheless, the issue may have practical significance.

Possibility #1: The landlord/seller may have sold the mobile home to the tenant pursuant to an installment sales contract and leased him the lot on which it is located. These are two separate agreements, but sometimes they are the subject of one written contract. Regardless of whether there is one contract or two, and no matter what the title of the document is, the analysis is the same: if the landlord/seller seeks summary ejectment, a judgment awarding possession will apply only to the lot, not to the mobile home. This may not be result the landlord/seller hoped for—he may have believed summary ejectment would let him recover both lot and property. In order to do this, however, two actions will be required:

summary ejectment for the lot, and an action to recover property for the mobile home. Finally, note that the usual rules apply to the latter. If the landlord/seller retained a security interest in the mobile home, his remedy is to proceed like any other secured party to recover possession of it. If he did not, his remedy is the same as that of any other unsecured party: he can sue the defaulting buyer for breach of contract, but he has no right to recover possession of the mobile home

Possibility #2: The mobile home is owned by a third party. Sometimes this situation arises when a tenant sells his mobile home to a third party. It may also arise when a tenant leases a mobile home space and then places a mobile home on the lot that is owned by a third party. In either case, the ownership of the mobile home is irrelevant to summary ejectment. In the eyes of the law, this situation is no different than that presented by a tenant who possesses a washing machine owned by his mother-in-law. For summary ejectment purposes, the issues before the magistrate are the same: (1) Is there a landlord-tenant relationship between plaintiff and defendant in reference to the mobile home space; and (2) do grounds for summary ejectment exist?

Possibility #3: The mobile home is owned by the tenant, but a third party has a security interest in it. The analysis in this case is identical to that in Possibility #2. The existence of a security interest is of no significance in determining whether a landlord is entitled to summary ejectment.

Landlord's authority to dispose of mobile home left on rental space. One of the questions magistrates are most frequently asked about relates to what happens after entry of judgment: landlords want to know what to do with mobile homes remaining on their property. Unlike the law discussed above, in which ownership of the mobile home is of little significance to the legal remedy involved, the law governing what happens after judgment is sometimes complex and is very much concerned with who owns the property. This is an area in which magistrates must be extremely careful to distinguish between giving information and giving advice. The appendix to this document contains a summary and discussion of the law in this area, and magistrates may wish to respond to inquiries by providing a copy of this appendix. A landlord who does not comply with the law in disposing of personal property remaining on leased premises risks being held liable under a number of legal theories; he would be well-advised to seek professional legal advice if he is uncertain of how the law applies to his particular situation.

Other issues related to summary ejectment from a mobile home.

Requirement of landlord-tenant relationship. One issue that comes up occasionally concerns the situation in which an alleged landlord seeks summary ejectment of an alleged tenant based on an agreement that is actually not a lease, but rather an installment sales agreement. Because the summary ejectment remedy is fast and inexpensive, sellers of mobile homes sometimes attempt to fashion their installment sales contract in a manner that resembles a lease. They may title it as such, refer to scheduled payments as "rent", or even insert a clause indicating the parties' intention that the document be considered a lease. None of these "cosmetic" features is determinative. The magistrate must look past the labels to the heart of the agreement to determine whether it is an agreement to purchase, in which ownership has passed to the buyer, or a lease, in which ownership of the property remains with the landlord.

Example: Smith shows you a "lease" which provides that Jones will make "rent" payments once a month for ten years, at the end of which time title to the property will be transferred to Jones. The document also says that if Jones misses a payment, the agreement about transfer of title is voided and the agreement is converted to a month-to-month tenancy. Because payment of "rent" in this case will eventually result in a transfer of title, most judges would refuse to treat this as a lease. The result is that Smith may not seek summary ejectment of Jones, but must instead pursue remedies available to him as a seller.

Residential Rental Agreement Act (RRAA)

G.S. 42-40 specifically provides that mobile homes and mobile home spaces are "premises" covered by the RRAA. Lessors of mobile homes have the same obligations as those of houses and apartments: to provide fit, habitable, and safe conditions. A tenant does not waive his right to recover for violations of the Act by taking possession of the premises with knowledge of the defect. G.S. 42-42 makes clear that landlords may not evade their responsibility under the Act by renting premises that are defective with an agreement that the tenant will make necessary repairs. While a landlord and tenant may enter into such an agreement, it must (1)be subsequent to the lease, (2) be written, (3) specify the work the tenant will do, and (4) state the benefit the tenant will receive for doing the work, with that benefit

being something more than what he already receives under the lease agreement.

Issues Arising Out of Security Interests in Mobile Homes

While there are numerous legal issues connected to actions to repossess mobile homes after default in a security agreement, the $5,000 amount in controversy requirement will keep most of these cases out of small claims court. As mentioned above, the existence of a security interest in a mobile home is of no consequence in summary ejectment cases. Because mobile homes are generally worth more than $5,000, actions to recover mobile homes as personal property brought by secured parties are generally district court actions. The same is true in the case of actions to recover deficiencies following sale of repossessed mobile homes. If a magistrate does encounter one of these cases in small claims court, however, he or she should simply remember that a mobile home is no different from any other personal property, even if it is permanently attached to the land.

Competing liens. One common fact situation encountered by magistrates is as follows: Tommy Tenant places a mobile home on Larry's Landlord's lot. Tommy owns the mobile home, but it is subject to a security interest held by Friendly Finance. When Tommy gets behind on his payments to Larry, Larry seeks summary ejectment and obtains a writ of possession. Tommy heads for the hills, leaving his mobile home sitting on Larry's lot. Larry would like to sell the mobile home and recoup some of his money. Can he?

Maybe. G.S. 44A-2(e2) authorizes Larry, as the lessor of a space for a mobile home, to assert a lien against furniture, furnishings, and other personal property, including the mobile home itself, if he (1) has a lawful claim for damages against Tommy, and (2) the mobile home is still there 21 days after the writ of possession has been executed. The statute makes clear, however, that Larry's claim does not have priority over Friendly's. Thus, if Tommy defaults in his payments to Friendly, Friendly has a legal right to come get the mobile home, assuming he is able to do so without causing a breach of the peace. If Friendly does not repossess the mobile home and Larry is able to sell it, Friendly's security interest will continue in it, and Friendly retains the right to repossess the home from the new owner.

Another issue comes up if Friendly "takes possession" of the mobile home by padlocking it. What rights does Larry have in this case? Can he charge Friendly rent, or damages for the continued loss of use of his land due to the presence of the mobile home? Can Larry have the mobile home towed, and then seek reimbursement from Friendly for the cost of removal? While a good case can be made for Larry's right to some compensation for the continued use of his land, no North Carolina case addresses the question.

Abandoned mobile homes. The issues discussed above arise only when Friendly takes possession of the mobile home pursuant to its security interest, as it is likely to do if the mobile home has value. If Friendly takes no action to repossess the home, the law is clear that Larry cannot compel it to do so [NCNB v. Sharpe, 35 N.C. App. 404 (1978)]. This situation arises when a tenant abandons a mobile home that has little remaining value, or that can be moved only with difficulty and probable damage. In this case, Larry has few attractive options, as abandoned mobile homes all over the State attest. While legally entitled to have the mobile home removed from his property, Larry will have to front the cost, which can be quite expensive, and he is likely to have difficulty recovering this expense from an absent tenant who may be judgment-proof.

A few counties have addressed the issue of abandoned mobile homes directly. Scotland County, for example, classifies abandoned mobile homes as solid waste and requires owners to remove them or face accumulating fines and jail time. Buncombe County offers free removal to qualifying property owners. Legislation that would have established a statewide fund to assist counties with removal was introduced in 2005 and may well be revived this session.

Criminal law issues related to mobile homes:

NCGS 15-58.1: Definition of "house" and "building".

Makes clear that mobile homes, manufactured-type housing, and recreational trailers are included in these terms. The result is that these structures are treated no differently from traditional structures for purpose of the laws pertaining to arson.

N.C.G.S. 14-58.2: Burning of mobile home . . .

The law provides that it is a Class D felony to commit the offense of willfully and maliciously burning a mobile home, manufactured-type house, or recreational trailer home that is the dwelling house of another while someone is present inside. While this statute may have been necessary prior to the clarification of law provided by GS 15-58.1 discussed above, this is no longer the case. First degree arson is likely to be the more appropriate charge, covering the same behavior but requiring one less element of proof (i.e., no requirement that the dwelling burned was a mobile home, manufactured-type house, or recreational trailer).

Note that a mobile home is a "building" for purposes of GS 14-59 (Burning of certain public buildings) and a "dwelling" for purposes of second degree arson.

In determining whether to charge "injury to real property" under G.S. 14-127 or "injury to personal property" under G.S. 14-160, be aware that either may be appropriate depending on the specific facts of the case. If the home is on a foundation, it is likely to be considered real property, while a home on wheels may be treated as personal property.

Appendix

Law Regulating Disposition of Tenant's Property Remaining on Mobile Home Space

Before a landlord has authority to take any action concerning the property of a residential tenant, he must obtain a judgment awarding him the right to possession of the rental property, have the clerk issue a writ of possession, and have the sheriff either lock the premises or place the property in storage. The rules discussed below apply only after this has occurred.

G.S. 42-36.2 applies to personal property, including mobile homes regardless of value. It provides that a tenant must take possession of his personal property when a writ of possession is executed. If the tenant does not do so, the sheriff shall deliver the property to a storage warehouse, unless the landlord agrees to allow the property to remain on the premises. The sheriff may require the landlord to pay for delivering the property to the warehouse as well as one month's storage fee. If the landlord refuses to advance these costs, the sheriff may refuse to remove the property. The costs of delivery and storage are charged to the tenant as court costs and constitute a lien against the property.

If a mobile home has a current value in excess of $500, the landlord's rights and obligations are controlled by G.S. 44A-(e2). That statute allows a landlord to remove and store any property (including a mobile home) remaining on the space after a writ of possession is executed. During the next 21 days, the tenant may take possession of the property at any mutually agreed upon time or during regular business hours. If the tenant does not recover the property he left behind within 21 days, the landlord may proceed to sell the property at a public sale. His right to do so is subject to two conditions:

1. The mobile home must be titled in the name of the tenant, and
2. The landlord must have a lawful claim for damages against the tenant. (Note that if the landlord and tenant have reached a contrary agreement about the landlord's rights in this event, that agreement will prevail.)

The first step in conducting a proper sale is to notify all the people who might be interested in the event. Because a mobile home is a motor vehicle in the eyes of the law (assuming no formal procedure has taken place to change its status from personal property to real property), DMV must be notified at least 20 days before a sale may take place. In addition, the landlord must notify the titleholder (i.e., the former tenant), any secured parties, and any other persons known or reasonably ascertainable who may have an interest in the property. The law states that this notice may be accomplished by taking the following steps:

1. Posting a copy of the notice of sale at the courthouse door in the county where the sale will be held;
2. Advertising the sale in a newspaper of general circulation in the same county once a week for two consecutive weeks, with the last publication date occurring at least 5 days prior to the sale; (Note: the publication requirement does not apply to mobile homes valued at less than $3,500 based on a schedule adopted by DMV.)

The law also specifies the information this notice must contain:

1. The name and address of the landlord.
2. The name of the titleholder and any other person with whom the landlord dealt.
3. A description of the property.
4. Amount of money the landlord is claiming he is entitled to (i.e., the amount of the lien).
5. The place of sale (must be either in the county where the mobile home space is located, or where the lease was entered into).
6. The date and hour of the sale (required to be on a day other than Sunday and between 10:00 AM and 4:00 PM).

The proceeds of sale are distributed in the following order:

1. Payment of reasonable expenses connected with the sale.
2. Payment of the amount owed the landlord (i.e., the amount of the lien.) This amount consists of (a) the amount of rent owed by the tenant at the time he vacated the premises, and (b) the rent due for the time after the tenant left up to the date of sale (60 days maximum), and (c) costs of repairing damages to the premises caused by the tenant not due to normal wear and tear. Any amount left over is paid to the tenant.

The law allows the landlord to purchase the mobile home at the public sale. If the landlord or someone closely connected to him purchases the property for a price significantly less than its fair market, it is of particular importance that the landlord be able to demonstrate substantial compliance with the statutory requirements concerning sale. G.S. 44A-4(g) states that a landlord who does not substantially comply with these rules (regardless of the identity of the purchaser) may be liable for damages in the amount of $100.00 and reasonable attorney's fees, in addition to actual damages resulting from his noncompliance. In addition, he may be vulnerable to an action for unfair trade practices, which entitles a successful plaintiff to treble damages.

The purchaser of a mobile home at a sale conducted under G.S. 44A must notify local tax authorities before moving the home, and he will be required to pay any back taxes owed. The purchaser should also be aware that his possession of the mobile home is subject to termination by a secured party whose interest in the property was properly recorded at the time of purchase. If Friendly Finance had a security interest in the mobile home and that security interest was recorded on the title at the time Paul Purchaser bought it, Friendly still has the right to repossess the home if the debtor defaults in making payments.

If a mobile home has a value under $500 the rules are simpler. The tenant has ten days from the time the landlord is put in possession to request the return of his property. During that ten-day period the landlord may store the property but must otherwise leave it undisturbed. Upon the tenant's request, the property must be returned to him during regular business hours or at a mutually agreed upon time. After ten days, the landlord may throw away, dispose of, or sell the property. Under most circumstances, a landlord is likely to find sale of a mobile home worth less than $500 difficult. In the event he decides to sell the mobile home, however, the statute sets out the required procedure:

1. He must give the tenant written notice by first class mail at the tenant's last known address at least seven days before public or private sale. (Note that this seven day period may overlap with the ten-day period.)
2. This notice shall state the date, time, and place of sale, and identify the allocation of proceeds: first to the landlord for unpaid rent, damages, storage fees, and expenses of sale, and then surplus to the tenant upon request. If the tenant does not

request the surplus within 10 days from sale, the amount will be paid to the county in which the property is located.

The tenant may recover his property upon request at any point up to the date of sale.

If a mobile home has a value under $100 the landlord need wait only five days after being put in possession before deeming it abandoned and disposing of it as he wishes.

Legal Issues Involving Mobile Homes:

Problems

1. Larry Landlord owns a mobile home park. He'd like to evict a troublesome tenant from the space he rents on a month-to-month basis. The lease is oral, and the rent is due on the 1st of each month. On March 1st he gives the tenant notice that the lease will end on March 30. The angry tenant refuses to give Larry the rent for March, saying, "I ain't paying, and I ain't leaving neither!" On April 1 Larry files an action for summary ejectment. Troublesome tenant is present and complains that he needs more time to arrange for the removal of his mobile home. Is Larry entitled to a judgment for possession?

2. Larry Landlord decides he's just sick of the whole business—he wants to close the park and open a drag racing track instead. He learned from his last experience and so is careful to give each individual tenant 60 days notice that their lease is ending and they should make arrangments to have their mobile homes off the rental space by the end of the sixty day period. You find yourself facing a lot of angry people, many of them waving receipts, when you come to court to hear Larry's action for summary ejectment against seven of his tenants. Larry asks if you could speed things up by hearing all seven cases at once. All seven are present (along with friends and families). What do you tell Larry?

   Larry testifies to the facts above. He admits that they're good tenants, and no one is behind on rent, but he says their leases have been terminated and he wants them out. How do you rule?

3. Larry's gone, but today Laine is in court seeking summary ejectment of a tenant from his mobile home space. The tenant says he'll be happy to leave, but points out that the mobile home belongs to his mother-in-law. Can you enter

a judgment for Laine, even though the mobile home belongs to someone else?

4. Laine has an idea that this tenant is going to leave without taking his mobile home with him. Since Laine has had problems with that in the past with other tenants, he asks that you enter judgment in his favor for $350 to repay him for the cost he will incur when he has to move the mobile home. He's ready to present expert testimony about the average cost of removing a mobile home if that helps.

5. While you're at it, Laine has a question about another situation. The tenant ran off and left a mobile home just sitting on the lot. Laine's not sure how much it's worth—he says, "Probably not much—you know how those things depreciate." He wants to know if he can give the mobile home to his sister. He hasn't heard from the tenant in 3 months.

6. In a change of pace Laine is in court as a defendant; his tenant has sued for damages under the Residential Rental Agreement Act. Laine admits that the trailer was in pretty bad shape when he rented it out, but explains that the tenant got a lower rate because of it. Also, since mobile homes are known to depreciate quickly, Laine says the RRAA shouldn't apply—that just wouldn't make sense. The tenant says when he walks down the hallway, he can see the grass growing through the floor. The hole makes it cold as well as a favorite place for local rats.

7. Friendly Finance has filed an action to recover personal property based on its security interest in a mobile home located on one of Laine's lots. Laine is in your office complaining about the case; the tenant owes him back rent and he believes he should be able to sell, or at least keep and re-rent, the mobile home. He says you can't hear the case since he's not a defendant.

Liability for Misdeeds of Animals

General rule: A person is not responsible for injuries caused by an animal unless a specific legal principle says he is. There are three legal principles that may result in a person being found responsible for the actions of an animal.

Principle #1: The owner or keeper of an animal with vicious propensities known to the owner or keeper is responsible for injuries resulting from those propensities.

Application of this principle requires a plaintiff to demonstrate four things:

1. The defendant is either the owner or keeper of the animal in question.

    a. A "keeper" of an animal is one who "exercises a substantial number of incidents of ownership," or in other words acts like an owner—feeding, grooming, or otherwise caring for an animal. A pet-sitter would probably be a keeper, as would a member of the household who, although not the legal owner, routinely cares for the animal.

    b. A landlord is not the "keeper" of an animal owned by a tenant merely by virtue of owning rental property.

2. The animal has vicious propensities.

    a. "Vicious" in this case has an unusual meaning. It does not mean that the animal is malicious or cruel; it means instead that the animal is dangerous, in the sense that something about it is likely to result in injury to another.

b. A large dog that jumps up on people or plays in a rough manner may be vicious within this definition. (Sink v. Moore, 267 N.C. 344 (1966).

c. A cat that scratches when it plays is not thereby vicious (Ray v. Young, 154 N.C. App. 492 (2002), nor is a dog that fights with other dogs or chases cars (Sink).

d. The clearest case of "vicious" occurs when an animal has previously behaved in a dangerous way. Evidence that a dog has bitten someone or otherwise behaved aggressively is strong support for a finding that the animal is vicious.

3. The owner or keeper of the animal knew of its vicious propensities.

a. Actual knowledge is not required; it is sufficient if the defendant had information that would have alerted a reasonable person to the potential danger.

b. Notice to the agent of an owner/keeper of an animal's vicious behavior is treated as notice to the agent/keeper himself. Similarly, notice to a household member is generally sufficient basis to find knowledge on the part of the owner/keeper.

4. The injury to plaintiff resulted from the animal's vicious propensity. (Tripping over a vicious dog that bites would not support a finding of liability, at least under this theory.)

NOTE: It is unclear whether under North Carolina law a defendant can escape liability by showing (1) that he took every step possible to avoid injury; or (2) that plaintiff's own negligence contributed to the injury. Many other states follow a rule of "strict liability" in these cases; that rule essentially says that if a person deliberately chooses to possess a vicious animal, he is responsible for any injury that results, even if he is entirely without other fault or if the injured party was partly at fault. It seems likely that North Carolina would follow this rule, but no case has squarely presented the issue as of yet. Even more unclear is whether the court would apply strict liability to a case in which another animal or other property is injured, as opposed to one in which a person is injured.

Principle #2: The owner or other person in control of an animal is responsible if he fails to use due care to prevent injuries that are reasonably foreseeable, given the general propensities of the animal, and the person injured is one to whom he has a duty.

In order to recover based on this principle, the plaintiff must show:

1. That the defendant had a duty to the plaintiff.

    a. The law imposes upon every person a duty to use ordinary care to protect others from injury, and so the required element of duty is generally easily met.

    b. An exception may arise, however, when the plaintiff is a trespasser. In such a case, an animal owner is responsible only for willful or wanton conduct.

    c. A concept connected to duty is the requirement that the defendant is the owner or is otherwise related to the animal in a manner making it reasonable to hold him responsible for the animal's behavior. A mere passerby has no duty to protect a person from injury by an animal he neither owns nor controls, for example.

2. That the animal injured the plaintiff.

3. That the injury was of a type reasonably foreseeable by the defendant.

    Most of the appellate cases have revolved around this issue. A recent case, Thomas v. Weddle, 167 N.C. App. 283 (2004), summarized the rules:

    a. If an animal is wild, an owner is assumed to know that it may behave in a wild (and thus dangerous) way.

    b. If an animal is large, an owner is assumed to be on notice that its size may present a risk of injury in some circumstances. (e.g., a horse may step on a child's foot).

    c. If an animal is of a breed known to be aggressive, an owner is held to notice of that fact. (Hill v. Williams, 144

N.C. App. 45 (2001) (Rottweilers are known to be an aggressive breed of dogs).

d. If an animal has behaved in a particular manner before, an owner is on notice that it may do so again:

"With regard to injuries inflicted by normally gentle or tame domestic animals, the law is clear that the test for liability is whether the owner knew or should have known from the animal's past conduct, including acts evidencing a vicious propensity, that the animal is likely, if not restrained, to do an act from which a reasonable person, in the position of the owner, could foresee that an injury to the person or property of another would be likely to result." Thomas (finding no basis for imposing liability for injuries inflicted by 8-week-old kitten).

NOTE: Contributory negligence on the part of the plaintiff will bar recovery for a claim based on the defendant's negligence.

Principle #3: The defendant violated a "safety statute" and the violation resulted in injury to the plaintiff.

1. Many cities and counties have "leash laws" and other restrictions on the care and keeping of animals enacted in an effort to protect the safety of people and their property. Under the legal principle of "negligence per se", a defendant may be held responsible for injuries resulting from a violation of such an ordinance or statute without any further showing of fault or negligence on the part of the defendant.

2. To establish liability, a plaintiff must show:

   a. That the defendant violated an ordinance or statute.

   b. The law does not require that defendant actually be convicted of violating the statute, but absent a conviction the judge must be careful to closely read the precise language of the law. In Dyson v. Stonestreet, 326 N.C. 798 (1990), the North Carolina Supreme Court held that an ordinance making it illegal for an owner "to permit" an animal to run at large required that the owner either negligently or knowingly did so; it was not enough merely to show that the animal ran loose. In that case, the owner

put on evidence showing that the animal had previously responded obediently to verbal commands. The Court said this evidence prevented a finding that the owner had violated the ordinance.

c. That the statute is a "safety statute", i.e., designed to protect public safety.

d. That the plaintiff was a member of the class sought to be protected. (Example: When plaintiff was injured by defendant shooting at a trespassing dog in violation of a statute prohibiting cruelty to animals, statute sought to protect animals, not people.)

e. That violation of the statute resulted in injury.

f. That plaintiff suffered damages as result.

2. There are a number of state statutes, set out in G.S. Chs. 67 and 68, governing misdeeds of animals, the violation of which will give rise to a claim for damages based on negligence per se. Two of the more commonly violated are:

a. G.S. 67-1, which provides that the owner of a dog is liable for injury to livestock or fowls caused by the dog while off the owner's premises, and

b. G.S. 67-12, providing that a person who allows a dog older than 6 months to roam at large at night is liable for resultant injury to persons or property.

3. A plaintiff who seeks to recover damages based on allegations of violation of a safety statute is responsible for identifying the particular statute providing the basis for his suit.

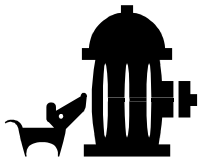
NOTE: Contributory negligence on the part of the plaintiff will bar recovery for injuries resulting from defendant's negligence based on violation of a statute.

Damages

The damages recoverable in an action based on misdeeds of an animal do not differ from those recoverable in any other action for negligence. A plaintiff is entitled to recover *out-of-pocket costs*, such as medical bills and loss of income, as well as future damages that may be reasonably foreseen (need for ongoing medical care, loss of future income, etc.) An injured party is also entitled to recover for *pain and suffering.*

If the action is one for *damage to property*, the usual measure of damages depends upon the extent of damage. If the property is destroyed, damages would be the value of the item immediately before its destruction. A lesser degree of injury might justify damages based on cost of repair. *Note that emotional distress or mental suffering is not a compensable damage item in cases involving loss of property.*

Punitive damages may be awarded if the defendant's conduct is so outrageous as to be "willful and wanton." An owner who allows a vicious dog to run free, knowing that it is likely to attack someone, may be subject to punitive damages. Hunt v. Hunt, 86, N.C. App. 323 (1987).



Special Rule for Dogs: G.S. 67-4.1 (Dangerous Dog Statute)

If a dog is a "dangerous dog" as defined in G.S. 67-4.1, its owner is liable for any injury it inflicts on people or property, even if the owner did everything he could to avoid injury.*

What is a dangerous dog? A dog that has (1) without provocation killed or inflicted severe injury on a person; (2) been declared to be a "potentially dangerous dog" under procedure established by statute; or (3) is owned for purpose of dog fighting, or is trained for dog fighting. "Severe injury" is established by showing broken bones, disfiguring lacerations, cosmetic surgery, or hospitalization as result of injury.

What is the procedure for having a dog declared "potentially dangerous"? The statute requires every city and county to designate a person or Board to handle citizen complaints about dangerous dogs. If a dog (1) has caused severe injury as defined above, or (2) killed or severely injured another animal while not on his owner's property, or (3) approached a person in a "vicious or terrorizing manner in an apparent attitude of attack" while not on his owner's property, it meets the criteria for a "potentially dangerous dog." The responsible person/board who determines a dog to be potentially dangerous gives written notice to the dog's owner, who may appeal to an Appellate Board.

In an action based on this statute, the plaintiff must show:

1. That the dog was a "dangerous dog";
2. That the dog injured plaintiff or plaintiff's property;
3. Amount of damages.

*(This is called "strict liability.")

Statutes of Limitation

Most intentional torts:	3 years
Negligence actions:	3 years
Contract for services:	3 years
Contract for sale of goods:	4 years
Contracts under seal:	10 years

Contracts Required to be Written

Contract for the sale of land.

Lease for more than 3 years.

Promise to pay the debt of another.

Retail consumer credit installment contract.

Contract for the sale of goods for $500 or more.

Security agreement.

Attorneys' Fees

Examples of authorizing statutes below. See Small Claims Law, pp. 91-94 for important restrictions.

G.S. 6-21.2: Plaintiff is suing to collect a debt and written agreement between parties contains provision for attorneys' fees. Notes, conditional sales contracts.
G.S. 6-21.3: Action on a check.
G.S. 25A-21: Actions involving consumer credit sales contracts.
G.S. 25-9-615(a)(1): Actions arising out of repossession of collateral.